TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 772.

THE ATLANTIC AND GULF RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED SEPTEMBER 16, 1878.

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1 STATE OF GEORGIA, *ss.*

To the Honorable Hiram Warner, Chief Justice of the Supreme Court of Georgia:

The petition of the Atlantic and Gulf Railroad Company, a corporation existing under the laws of said State of Georgia, respectfully showeth that at the January term, in the year of our Lord one thousand eight hundred and seventy-eight, of said supreme court, there came on to be heard the cause of the State of Georgia, plaintiff in error, against your petitioner, defendant in error.

That said cause had originated in an affidavit and amendment, filed in behalf of your petitioner, that an execution which had been issued by the comptroller-general of the State of Georgia, against your petitioner, for the sum of eight thousand seven hundred and fifty-four dollars and fifty-five cents, was proceeding illegally in
2 this, that said money was alleged to be due by your petitioner, as taxes under an act of the legislature of said State of Georgia, bearing date the twenty-eighth day of February, eighteen hundred and seventy-four, entitled "An act to amend the tax laws of this state, so far as the same relate to railroad companies, and to define the liabilities of said companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act," and of the acts amendatory thereof; and that the said act, in so far as it attempts to repeal any portion of the charter of your petitioner, or to impose upon the railroad of your petitioner and the appurtenances of the same another and greater tax than one-half of one per centum on the annual net income of your petitioner, is void and of no effect, inasmuch as
3 it is an act impairing the obligation of the contract between your petitioner and the State of Georgia, through its charter and the amendments thereto, and is therefore a violation of the first paragraph of the tenth section of the first article of the Constitution of the United States; that the issue as made by said affidavit was tried before his honor the judge of the Superior Court of Fulton County, upon an agreement of facts which was made part of the bill of exceptions to the Supreme Court of Georgia, which said agreement set forth the extracts from the charters of the railroad forming your petitioner's road, showing the exemption of your petitioner from any other or higher tax than one-half of one per cent. on the annual net income of your petitioner, and other facts therein stated and agreed to, all of which are part of the record of this honorable court, and are specially referred to and made part of this petition;
4 that the said judge rendered his decision sustaining said affidavit of illegality, whereupon the said the State of Georgia sued out its writ of error to the said decision to the said Supreme Court of Georgia, which is the highest court of law and equity in the said state wherein a decision could be had in said cause; that on the sixteenth day of April, in the year eighteen hundred and sev-

enty-eight, the said the Supreme Court of Georgia rendered its decision reversing the decision of the court below and sustaining the validity of said act or statute of the State of Georgia as not being repugnant to the Constitution and laws of the United States.

Your petitioner further shows your honor that the court was upon the eve of adjournment when the said decision was rendered, and that an order was taken on the seventeenth day of April, 1878, al-
5 lowing your petitioner thirty days within which to file its petition for writ of error, and that in the meantime the clerk of said supreme court retain the remittitur; said order allowing your petitioner thirty days from said 17th day of April, 1878, to sue out its writ of error in the said cause to the Supreme Court of the United States to obtain the citation.

Your petitioner further shows that it has been greatly damaged by the said decision, and prays your honor to allow it a writ of error to the said the Supreme Court of the United States, and the proper citation thereon, to the end that the error of such decision, if any there has been, may be duly corrected.

R. FALLIGANT,
HARTRIDGE & CHISHOLM,
For Petitioner.

(Endorsed:) Supreme Court of Georgia. The Atlantic & Gulf Railroad Company vs. The State of Georgia. Petition for writ of error. Filed in office May 13, 1878. Z. D. Harrison, clk. S. C. Ga.

6 UNITED STATES OF AMERICA, *ss.*

The President of the United to the honorable the judges of the Supreme Court of the State of Georgia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity in the said state, in which a decision could be had in the said suit between the State of Georgia, plaintiff in error, and the Atlantic and Gulf Railroad Company, defendant in error, wherein was drawn in question the validity of a statute of the State or Georgia, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error has happened, to the great damage of the said the Atlantic and Gulf Railroad Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the rec-
7 ord and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next, in the said Supreme Court, to be then and

there held, that the record and proceedings aforesaid, being inspected, that the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

A. E. BUCK,

[SEAL.] *Clerk U. S. Circuit Court, 5th Circuit, Northern District Georgia.*

ATLANTA, GA., *May 13th*, 1878.

The above and foregong writ of error allowed by

HIRAM WARNER,

Chief Justice Supreme Court Georgia.

(Endorsed:) Supreme Court of the United States. The Atlantic & Gulf Railroad Company, plaintiff in error, vs. The State of Georgia, defendant in error. Writ of error to the Supreme Court of Georgia. Filed in office May 13th, 1878. Z. D. Harrison, clk. S. C. Ga. R. Falligant, Hartridge & Chisholm, attys. for plff. in error.

8 United States of America to the State of Georgia, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington, on the day of next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Georgia, wherein the Atlantic and Gulf Railroad is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Warner, Chief Justice of the Supreme Court of Georgia, this 13th day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] Z. D. HARRISON,

Clk. S. C. Ga.

HIRAM WARNER,

Chief Justice Supreme Court of Georgia.

(Endorsed:) Due and legal service of the within citation acknowledged, and copy and other service waived this 13th day of May, 1878. Robb. N. Ely, Atty.-Genl. of Ga. Alfred H. Colquitt, Gov'r of Geo.

(Endorsed:) Supreme Court of the United States. The Atlantic and Gulf Railroad Company, plaintiff in error, vs. The State of Georgia, defendant in error. Citation. Filed in office May 13, 1878. Z. D. Harrison, clk. S. C. Ga. R. Falligant, Hartridge & Chisholm, attys. for plff. in error.

9 UNITED STATES OF AMERICA.

THE STATE OF GEORGIA, PLAINTIFF IN ERROR,
vs.
THE ATLANTIC & GULF RAILROAD COMPANY,
Defendant in Error.

Know all men by these presents that the Atlantic and Gulf Railroad Company, principal, and John Screven and William S. Basinger, surety, are held and firmly bound unto the above named, the State of Georgia, in the sum of one thousand dollars, to be paid to the said State of Georgia. To which payment well and truly to be made the said the Atlantic and Gulf Railroad Co. and the said John Screven and William S. Basinger are bound and jointly and firmly bind themselves and the successors of said Atlantic and Gulf Railroad Company and the heirs, executors, and administrators of the said John Screven and William S. Basinger firmly by these presents. Signed, sealed, and dated this 13th day of May, in the year one thousand eight hundred and seventy-eight.

Whereas, the above named, the Atlantic and Gulf Railroad Company, has prosecuted a writ of error to the Supreme
10 Court of the United States to reverse the judgment rendered in the above-entitled suit by the Supreme Court of the State of Georgia.

Now, therefore, the consideration of this obligation is such that if the above-named the Atlantic and Gulf Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE ATLANTIC & GULF RAILROAD COMPANY,
by JOHN SCREVEN, *President.*
JOHN SCREVEN. [L. S.]
WM. S. BASINGER. [L. S.]

Signed, sealed, and delivered in presence of—
R. H. DE MONTMOLLIN,
U. S. Cir. Ct. Com'r. So. Dist. Ga.

The above bond examined and approved this 15th day of May, 1878.
HIRAM WARNER,
Ch. Justice S. C. Geo.

(Endorsed:) Supreme Court of the United States. The Atlantic & Gulf Railroad Company vs. The State of Ga. Copy bond. Filed in office May 15, 1878. Z. D. Harrison, clk. S. C. Ga.

11 STATE OF GEORGIA, FULTON COUNTY. } COMPTROLLER-GENERAL'S OFFICE.

To all and singular the sheriffs and other lawful officers of this state:

You are hereby commanded that of the goods and chattels, lands, tenements, and franchises of the Atlantic and Gulf Railroad Com-

pany, a corporation chartered and doing business in this state, you cause to be made the sum of $8,754.55 (eighty-seven hundred and fifty-four $\frac{55}{100}$ dollars), as its tax for the year 1875, assessed against it upon a return of property made by the president of said corporation, of file in this office, and that you pay over said sum of money to the comptroller-general of said state, at his office in Atlanta, Georgia, and return thereto this fi. fa. with your actings and doings entered thereon. Witness W. L. Goldsmith, comptroller-general of said state, under the seal of said office.

12 Issued this the 3d day of November, 1875.

W. L. GOLDSMITH,
Comptroller-Genl. of Geo.

STATE OF GEORGIA. } SHERIFF'S OFFICE, *Nov.* 15, 1875.
CHATHAM COUNTY. }

Under and by virtue of the within fi. fa. I have this day levied upon the buildings known as the machine shop, locomotive house, and car shop, situate, lying, and being at the Atlantic and Gulf railroad depot, in the city of Savannah, county and state aforesaid, and will advertise and sell the same in terms of the law, the property of the defendant.

The return of MAY, 17, 1876.

JOHN T. RONAN,
Sheriff of C. Co., Ga.

STATE OF GEORGIA
vs.
THE ATLANTIC & GULF RAILROAD COMPANY. } Fi. fa. &c. Chatham county, returnable to Fulton county.

And now comes the said the Atlantic and Gulf Railroad Company, the defendant in said fi. fa., and saith that the said fi. fa. has been levied on the building known as the machine shop,

13 locomotive house, and car shop, situate, lying, and being at the Atlantic and Gulf Railroad depot, in the city of Savannah, county of Chatham, and State of Georgia, (the property of the defendant,) and the said fi. fa. is proceeding illegally, because this defendant saith—

1st. That by the charter of incorporation of the Savannah, Albany & Gulf Railroad Company, granted December 25, 1847, it was declared that the defendant was "invested with all the rights, privileges, and immunities which by the laws of Georgia are held and enjoyed by any other incorporated railroad company within this state;" that by the 18th section of the act of incorporation of the company now known as the Central Railroad & Banking Company of Georgia, then the Central Railroad Canal Company, approved December 14th, 1835, it was declared that the railroad and the appurtenances to the same shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income. And fur-

14 ther, that by the act of incorporation of the Atlantic and Gulf Railroad Company should be entitled to all the privileges,

immunities, and exemptions granted to the Central Railroad and Banking Company of Georgia, and the Georgia Railroad and Banking Company, or either of them, by the acts incorporating said two companies, and that one of the exemptions to said two companies was that said railroads and their appurtenances should not be taxed by the State of Georgia higher than one-half of one per centum upon their annual net income; and this deponent further says that, under the said charters of said two companies, the chartered stock of said the Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company was subscribed, paid up, and expended in the construction of said railroad and appurtenances, and in the purchase and erection of such depots, buildings, and other appurtenances as properly belong to the same; and that the said stockholders accepted said charters, and that the provis-
15 ions of said charter have never been repealed, changed, with the consent of said stockholders or this defendant.

And this defendant says that by the act of the legislature of the State of Georgia, passed the 18th day of April, 1863, the said the Atlantic & Gulf Railroad Company and the said the Savannah, Albany & Gulf Railroad Company were authorized to consolidate their stocks upon such terms as might be agreed upon by the directors of said railroad companies and ratified by a majority of the stockholders thereof; and that it was specially provided by said last act, that the several immunities, franchises, and privileges granted to the said the Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, shall continue in force; and further, that nothing in said act shall be so construed as to impair the covenants and obligations of the Atlantic & Gulf Railroad Companies to and with the
16 State of Georgia. And this deponent further says, that the said two companies, relying on the pledge *of* the state that their rights, privileges, franchises, immunities, and exemptions should continue of force unimpaired, entered into arrangements with each other, by which the two roads should be worked together under the name of the Atlantic & Gulf Railroad Company, but have never surrendered to the state any of their chartered rights. And this deponent further says that all the property on which said taxes is assessed, and said tax fi. fa. issued, is the property in which the capital stock of the said the Savannah, Albany & Gulf Railroad companies, and the said origiual, the Atlantic & Gulf Railroad Company is invested, and constitutes as well the stock as the railroad and appurtenances of said two companies, now known as the Atlantic & Gulf Railroad Company, this defendant, and that the tax so assessed is a tax on its railroad and appurtenances, and that the tax so assessed is a tax which far exceeds a tax of one-half of one per centum on its annual net income.

17 And this deponent further says that it made no net income during the year 1874. This deponent further says

that there is no valid law of the State of Georgia, under which the said tax was assessed and the said fi. fa. issued against this defendant, and that the act of the legislature of the State of Georgia, approved on the 28th day of February, 1874, entitled "An act to amend the tax laws of this state so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charter of such companies respectively as may conflict with the provisions of this act," is unconstitutional, null, and void, and of no legal effect, in this, that the said act attempts to repeal a material portion of the charter of this company and to impose upon the railroad and appurtenances of this defendant another and greater tax than one-half of one per centum per annum on the net income of this defendant, in which said action is in conflict with paragraph 1, section 10, article
18 1, of the Constitution of the United States, inasmuch as it is an act impairing the obligation of contract between the State of Georgia and the defendant and its stockholders.

And this defendant further says that this affidavit is not interposed for the purpose of delay, but *bona fide* in defence of the rights of this defendant against the levy of said tax *fi. fa.*

Personally appeared John Screven, president of the Atlantic & Gulf Railroad Company, the above-named defendant, who being duly sworn, deposes and says, that the facts set forth in the foregoing and above affidavit are true.

JOHN SCREVEN,
President of the Atlantic & Gulf Railroad Company.

Subscribed and sworn to before me, this 4th day of January, 1876.

JOHN W. BURROUGHS,
N. Public, Chatham County, Geo.

Filed in office Sept. 1st, 1876.

J. D. COLLINS, *C. S. C.*

19 *Amendment to Affidavit of Illegality filed by Counsel, Nov. 24, 1876.*

And this defendant further says, that the 12th section of an act of the General Assembly of the State of Georgia, approved March 3d, 1875, and entitled "An act to levy a tax for the support of the government for the year 1875, to amend an act entitled an act to amend the tax laws of the state and for other purposes, approved February 28th, 1874, to provide for the collection of taxes due the state and for other purposes therein mentioned," is unconstitutional, null, and void, and of no legal effect, in this, that the said acts attempt to impose [upon] the railroad and appurtenances of this defendant another and greater tax than one-half of one per centum per annum on the net income of this defendant, in which said act is in conflict with paragraph 1, section 10, article 1, of the Constitution of the United States, inasmuch as it is an act impairing the

obligation of the contract between the State of Georgia and
20 this defendant and its stockholders. And this defendant further says that the said tax act of 1875, in its 12th section, is unconstitutional, null, and void, because it is in violation of the Constitution of the State of Georgia, as contained in sections 5,019 and 5,056 of the Revised Code of 1873.

And this defendant further says, that it has made a return of its gross receipts and has returned that it has no net income from 1 May, 1874, to 1 May, 1875, and that the comptroller-general has assessed no tax on income against this defendant for said period.

Filed in office Nov. 24, 1876. J. D. COLLINS, *C. S. C.*

Agreement of Facts.

Upon the trial of the above cause the following facts are agreed upon by counsel for plaintiff and defendant, as the facts to be prepresented on the trial of the issues between the parties:

1st. That the Savannah and Albany Railroad Co. was in-
21 corporated by an act of the legislature of Georgia, on the 25th day of December, 1847, and that by the first section of said act of incorporation the said railroad company was invested with all the rights, privileges, and immunities which, by the laws of Georgia, were held and enjoyed by any incorporated railroad company or companies.—(See Pamphlet Laws of Ga. 1847, p. 191.)

2nd. That the Atlantic and Gulf Railroad Company was incorporated by an act of the legislature of Georgia, approved the 27th day Feb'y, 1856, by the fourth section of which act it was declared that all the privileges, immunities, and exemptions granted to the Central Railroad and Banking Company and the Georgia Railroad and Banking Company, or either of them, by the acts incorporating said companies, and the several acts amendatory thereof, were granted to the Atlantic and Gulf Railroad Company.—(See Acts 1856, pam., 160.)

3. That the said two railroad companies, under their re-
22 spective acts of incorporation, constructed their several lines prior to 1860.

4. That on the 18th day of April, 1863, the legislature of Georgia passed an act authorizing the consolidation of the stocks of the Savannah, Albany and Atlantic and Gulf Railroad Company, which was to be ratified by a majority of the stockholders of said two companies, and by the third section of which said act it was declared "that the several immunities, franchises, and privileges granted to the Savannah, Albany and Gulf R. R. Co. and the Atlantic and Gulf Railroad Company by their original charters, and the amendments thereof, and the liabilities therein imposed, shall continue in force, except so far as they may be inconsistent with this act of consolidation.—(See Pamphlet Laws 1863, p. 223.)

5. That for years before, and at the time of the passage of the

act of consolidation of said two companies, in April, 1863,
23 the State of Georgia was a stockholder in said original Atlantic and Gulf Railroad Company, to the extent of one million dollars, and that in June, 1863, the State of Georgia voted for said consolidation, casting therefor ten thousand votes, that being the number of shares then held by the state in said company; that on June 30, 1863, the terms of consolidation had been agreed upon by both companies.

It is further agreed that there are still outstanding, in the hands of *bona fide* holders, a large number of the bonds of the Savannah, Albany and Gulf Railroad Company and of the Atlantic and Gulf Railroad Company, secured by mortgages on the property of the respective companies, issued before consolidation.

It is also agreed that the preface to the Code of Georgia, signed by David Irwin, Thomas R. R. Cobb, and R. H. Clark, and also the report of the committee on the part of the senate and house of representatives of Georgia, as contained on page 3, 4, 5, and 6 of the code, revised by Irwin, Lester, and Hill, be admitted in evi-
24 dence. It is also agreed that the body of laws known as the Revised Code of Laws, prepared by Richd. C. Clark, Thomas R. R. Cobb, and David Irwin, was not read three times in each house on three separate days, as prescribed by the constitution of Georgia, but was adopted by reference to a manuscript file in the executive department.

6. That the State of Georgia is still a stockholder, and has retained her original scrip in the Atlantic and Gulf Railroad Company. She has never surrendered her old scrip and has never taken any new scrip under the consolidation.

7. That there has been no act of the legislature of Georgia since April, 1863, affecting said companies as consolidated.

8. That during the year 1874 the gross receipts of defendant amounted to $990,899.13, and the expenditures to $1,248,180.69, an itemized account of which is hereto attached, marked exhibit "A."

25 9. That defendant has never made or paid a dividend of any kind, and that neither of the said companies, before consolidation, have ever made or paid a dividend of any kind.

10. That the State of Georgia, up to the passage of said act of 1874, had never collected from said defendant any tax whatever, and that said companies have always claimed that they never have made a net income.

11. That in perfecting the consolidation of the stocks of said companies there was no requirement that new scrip should be issued to the holders thereof. Each stockholder continued to hold his original scrip.

12. That said defendant has made returns under oath semi-annually to the governor of the state, containing a full and accurate statement of the pecuniary affairs of the defendant.

13. That at the time of said consolidation, and before, both companies had the same president, treasurer, and other officers,
26 who continued after consolidation.

14. It is also agreed that the affidavit may be amended without being sworn to, so as to make it conform to the agreed state of facts, and that either party may use any parts of the charters, and amendments thereof, before any court before which this cause may be tried.

That defendant has made a return of its gross receipts, and has returned that it has no net income from 1st May, 1874, to 1st May, 1875, and that the comptroller-general has assessed no tax on income against the defendant for said period.

15. It is agreed to submit this cause to the adjudication of the judge or acting judge of the Superior Court of Fulton County, without the intervention of a jury, subject to review by the Supreme Court, Atlanta, Ga.

Nov. 22, 1871.

R. FALLENGANT,
HARTRIDGE & CHISHOLM,
Attys. A. & G. R. R. Co.

27

N. J. HAMMOND, *Atty. Genl.*
R. TOOMBS, *for State.*

16. It is further agreed that there are still outstanding in the hands of *bona fide* holders a large number of the bonds *of* the Savannah, Albany and Gulf Railroad Company, and of the Atlantic and Gulf Railroad Company, secured by mortgages on the property of the respective companies, issued before consolidation. It is also agreed that the preface to the Code of Georgia, signed by David Irwin, Thomas R. R. Cobb, and R. H. Clark, and also the report of the committee on the part of the senate and house of representatives of Georgia, as contained on pages 3, 4, 5 & 6 of the code, revised by Irwin, Lester, and Hill, be admitted as evidence. It is also agreed that the code of laws prepared by Richard H. Clark, Thomas R. R. Cobb, and David Irwin, was not read three times in each house, on three separate days, as prescribed by the constitution of Georgia, but was adopted by reference to a manuscript on file in the executive department.

28 Filed in office Nov. 24, 1876.

J. D. COLLINS, *C. S. C.*

Judgment by the Court.

The court, in the within case, having taken time to consider until to-day, orders as follows: After hearing argument and considering the agreed statement of facts submitted, upon which the court was asked to pronounce judgment, it is ordered that the illegality is well taken, and that the same be and is sustained, and that the *fi. fa.* be returned to office and go for naught. And that the defendant have a verdict accordingly.

C. PEEPLES,
Judge S. C. A. C.

Dec. 22, 1876.

GEORGIA,
FULTON COUNTY.

I, James D. Collins, clerk of superior court in and for said county, do certify that the above and foregoing is a true and complete copy and transcript of the record in case of State vs. Atlantic &
29 Gulf R. R. Co., as appears of record, and that said court adjourned on 31 January, 1877.

Given under my hand and seal of office, this 9th day of February, 1877.

[SEAL.]

Filed in office Feby. 14, 1877. Z. D. HARRISON.

30 *Tax fi. fa. from Comptroller-General's Office and Illegality.*

THE STATE
vs.
ATLANTIC AND GULF R. R. COMPANY. } In Fulton County, Ga.

On the 22d of November, 1876, during the regular term of the superior court for said county, said cause came on for trial before his honor Cincinnatus Peeples, judge of the superior courts of the Atlantic circuit, presiding. It was submitted to his decision without the intervention of a jury, subject to review by the supreme court.

The facts were agreed upon by the counsel, and were as follows:

In the Superior Court of said County.

GEORGIA,
FULTON COUNTY.

Tax fi. fa. levied, and affidavit of illegality and bond filed by defendant.

THE STATE OF GEORGIA
vs.
THE ATLANTIC AND GULF RAILROAD COMPANY.

Upon the trial of the above cause the following facts are agreed upon by counsel for plaintiff and defendant, as the facts to
31 be presented on the trial of the issue between the parties:

1. That the Savannah and Albany Railroad Company (afterwards the Savannah, Albany and Gulf R. R. Co.) was incorporate by an act of the legislature of Georgia, on the 25th day of December, 1847, and that by the first section of said act of incorporation the said railroad company was invested with "all the rights, privileges, and immunities which, by the laws of Georgia, were held or enjoyed by any incorporated railroad company or companies."—(See Pamp. Laws Ga. 1847, p. 191.)

2. That the Atlantic and Gulf Railroad Company was incorporated by an act of the legislature of Georgia, approved the 27th day of February, 1856, by the fourth section of which act it was declared "that all the privileges, immunities, and exemptions granted to the Central Railroad and Banking Company and the Georgia Railroad

and Banking Company, or either of them, by the acts incorporating said companies, and the several acts amendatory thereof,
32 were granted to the Atlantic and Gulf Railroad Company.—(See Pamph. Act 1856, p. 160.)

3. That the said two railroad companies, under their respective acts of incorporation, constructed their several lines prior to 1860.

4. That on the 18th day April, 1863, the legislature of Georgia passed an act authorizing the consolidation of the stock of the Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, which was to be ratified by a majority of the stockholders of said two companies, and by the third section of which said act it was declared that the several immunities, franchises, and privileges granted to the Savannah and Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Companies by their original charters and the amendments thereof, and the liabilitherein imposed, shall continue in force, except so far as they may be inconsistent with the act of consolidation.—(See Pamph. Laws 1863, p. 271.)

33 5. That for years before, and at the time of the passage of the act of consolidation of said two companies, in April, 1863, the State of Georgia was a stockholder in said original Atlantic and Gulf Railroad Company to the extent of one million dollars, and that in June, 1863, the State of Georgia voted for said consolidation, casting therefor ten thousand votes, that being the number of shares then held by the state in said company. That on June 30th, 1863, the terms of consolidation had been agreed upon by both companies.

6. That the State of Georgia is still a stockholder and has retained her original scrip in the Atlantic and Gulf Railroad Company. She has never surrendered her old scrip and has never taken any new scrip under the consolidation.

7. There has been no act of the legislature of Georgia, since April, 1863, affecting said companies as consolidated.

34 8. That during the year 1874 the gross receipts of the defendant amounted to $990,899.13 and the expenditures to $1,248,180.69, an itemized account of which is hereto attached, marked exhibit "A."

9. That defendant has never made or paid a dividend of any kind, and that neither of the said companies, before consolidation, have ever made or paid a dividend of any kind.

10. That the State of Georgia, up to the passage of said act of 1874, has never collected from said defendant any tax whatever, and that said companies have always claimed that they never have made net income.

11. That in perfecting the consolidation of the stocks of said companies there was no requirement that new scrip should be issued to the holders thereof. Each stockholder continued to hold his original scrip.

12. That said defendant made returns under oath semi-annually to the governor of the state, containing a full and accurate
35 statement of the pecuniary affairs of the defendant.

13. That at the time of said consolidation, and before, both companies had the same president, treasurer, and other officers, who continued after consolidation.

15. It is also agreed that the affidavit may be amended without being resworn to, so as to make it conform to the agreed state of facts, and that either party may use any parts of the charters and the amendments thereof before any court before which this cause may be tried. That defendant has made a return of its gross receipts, and has returned that it had no net income from 1st May, 1874, to 1st May, 1875, and that the comptroller-general has assessed no tax on income against this defendant for said period.

15. It is agreed to submit this cause to the adjudication of the judge or acting judge of the Superior Court of Fulton County, without the intervention of a jury, subject to review by supreme court.

36 16. It is further agreed that there are still outstanding in the *house* of bona fide holders a large number of the bonds of the Savannah, Albany and Gulf Railroad Company and of the Atlantic and Gulf Railroad Company, secured by mortgages on the property of the respective companies, issued before consolidation.

It is also agreed that the preface to the Code of Georgia, signed by David Irwin, Thomas R. R. Cobb, and R. H. Clark, and also the report of the committee on the part of the senate and house of representatives of Georgia, as contained on pages 3, 4, 5, and 6 of the code revised by Irwin, Lester, and Hill, be admitted as evidence.

It is also agreed that the body of laws known as the Revised Code of Laws, prepared by Richard H. Clark, Thomas R. R. Cobb, and David Irwin was not read three times in each house, on three separate days, as prescribed by the constitution of Georgia, but was adopted by reference to a manuscript on file in the executive department.

17. It is further agreed that all the property on which said
37 tax is assessed and said tax *fi. fa.* issued, is the property in which the capital stock of the said the Savannah, Albany and Gulf Railroad Company and said Atlantic and Gulf Railroad Company is invested, and constitutes as well the stock as the railroad and appurtenances of said two companies' road, known as the Atlantic and Gulf Railroad Company, the defendant, and that the tax so assessed is a tax on its railroad and appurtenances, and that the tax so assessed is a tax which far exceeds a tax of one-half of one per centum on its annual net income.

(Signed) R. FALLIGANT,
HARTRIDGE & CHISHOLM,
Attorneys A. & G. R. R. Co.,
and N. J. HAMMOND, *Atty. Gen'l*,
and R. TOOMBS, *for State.*

The itemized account in VIII. was not attached or used on the argument. No point was made on the same.

After argument had the court took time to consider until
38 the 22d of December, 1876, and then sustained said illegality, and ordered the *fi. fa.* returned to office and go for naught, and that defendant have a verdict accordingly, and plaintiff's counsel then and there excepted.

And as said facts do not appear of record, come the counsel for the state during said term of said court, which is still in session, and within sixty days from said judgment, and tender this their bill of exceptions and say that the court erred in sustaining said illegality and rendering said judgment for that there is no sufficient ground in said illegality and facts for such decision. And they pray that this bill of exceptions may be signed and certified according to the statute in such cases made and provided.

N. J. HAMMOND, *Atty. Gen.*
R. TOOMBS, *for Plff. in Error.*

STATE OF GEORGIA,
FULTON COUNTY.

I do certify that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the
39 errors complained of; and the clerk of the Superior Court of Fulton County, Georgia, is hereby required and ordered to make out a complete copy of the record of said case, and certify the same as such, and cause the same to be transmitted to the July term, 1877, of the supreme court, that the errors alleged to have been committed may be considered and corrected.

January 3d, 1877. C. PEEPLES, *Judge S. C. A. C.*

GEORGIA,
FULTON COUNTY.

I, Jas. D. Collins, clk. supr. court in and for said county, do certify that the above and foregoing is the true original bill of exceptions in case of State of Ga. vs. Atlantic and Gulf R. R. Co., as appears of file in my office, and that said court adjourned on 31st January, 1877.

Given under my hand and seal of office, this Feby. 9, 1877.
[SEAL.] J. D. COLLINS, *C. S. C.*

40 Due and legal service of the within bill of exceptions is hereby acknowledged and copy waived.

This 13th January, 1877. R. FALLIGANT,
HARTRIDGE & CHISHOLM,
Defts. Attys.

Original bill of exceptions filed in office 15th January, 1877.
JAMES D. COLLINS, *C. S. C.*

Filed in office Feby. 14, 1877.
Z. D. HARRISON.

41 SUPREME COURT OF GEORGIA,
TUESDAY, *April* 16, 1878.

The honorable Supreme Court of the State Georgia met pursuant to adjournment. Present, their honors Hiram Warner, chief justice, and L. E. Bleckley and James Jackson, judges.

The following judgment was rendered:

THE STATE OF GEORGIA
vs.
THE ATLANTIC & GULF R. R. Co.

This case came before the court upon a transcript of the record from the Superior Court of Fulton County, and after argument had it is considered and adjudged by the court that the judgment of the court below be reversed on the ground that the court erred in sustaining the illegality and in ordering that the *fi. fa.* be returned and go for naught.

42 *Opinions Supreme Court of Ga.*

THE STATE OF GEORGIA
vs.
THE ATLANTIC AND GULF RAILROAD COMPANY.

By the Court:

1. The Savannah and Albany Railroad Company and the Atlantic and Gulf Railroad Company having been chartered prior to the adoption of the code—the former in 1847, for thirty years only, the latter in 1856, without limit as to duration—and the consolidation of the two upon such terms and conditions as might be agreed upon by their directors, and ratified by a majority of their stockholders, having been authorized by an act of the general assembly, passed in 1863 (after the code went into effect), which act declared that "the said railroad companies, when so consolidated, shall be known as 'The Atlantic and Gulf Railroad Company;' that nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into by either, but this company shall be liable on the same; that the stockholders of said consolidated railroad companies, by such corporate name, and in such corporate capacity, are made capable in law to have, pur-
43 chase, and enjoy such real and personal estate, goods, and effects as may be necessary and proper to carry out the objects herein specified, and to secure the full enjoyment of all the rights herein and hereby granted, and by said name to sue and be sued, and plead and be impleaded, in any court of competent jurisdiction, to have and use a common seal, and the same to alter at pleasure, and to make, ordain, and establish such rules, by-laws, and regulations as shall seem necessary and convenient for the government and protection of said corporation, the same not being contrary to the constitution and laws of this state, and generally to do and perform and execute all such acts, matters, and things as may

pertain to corporations of like character; and that the several immunities, franchises, and privileges, granted to the said Savannah, Albany, and Gulf Railroad Company and the Atlantic and Gulf Railroad Company by their original *character* and the amendments thereof, and the liabilities therein imposed shall continue in force, except so far as they may be inconsistent with this act of consolidation."

Held, That when the consolidation took place in pursuance of the act of 1863, a new corporate being came into existence, and whatever of the property of the former companies passed to it, as
44 well as whatever property it subsequently acquired, became subject to the general taxing power of the legislature, irrespective of any concession or limit of the power which the charters of the former companies contained, there being in the new charter no express negative upon the right of the state to "withdraw the franchise" or to "change, modify, or destroy" the corporation.—(Code, sections 1,682, 1,651.)

2. The case of The Central Railroad and Banking Company vs. The State, 54 Ga., 401, until adjudged to be erroneous, was sufficient to rule the present case; but since the reversal of the judgment in that case by the Supreme Court of the United States, a closer comparison of the legislation involved in the two cases becomes important; and, on such comparison, it is apparent that the legislative purpose to create a new corporation is not, in this instance, doubtful; whereas, in the former, as determined by the court of last resort (2 Otto, 143), the purpose did not exist.

Judgment reversed.

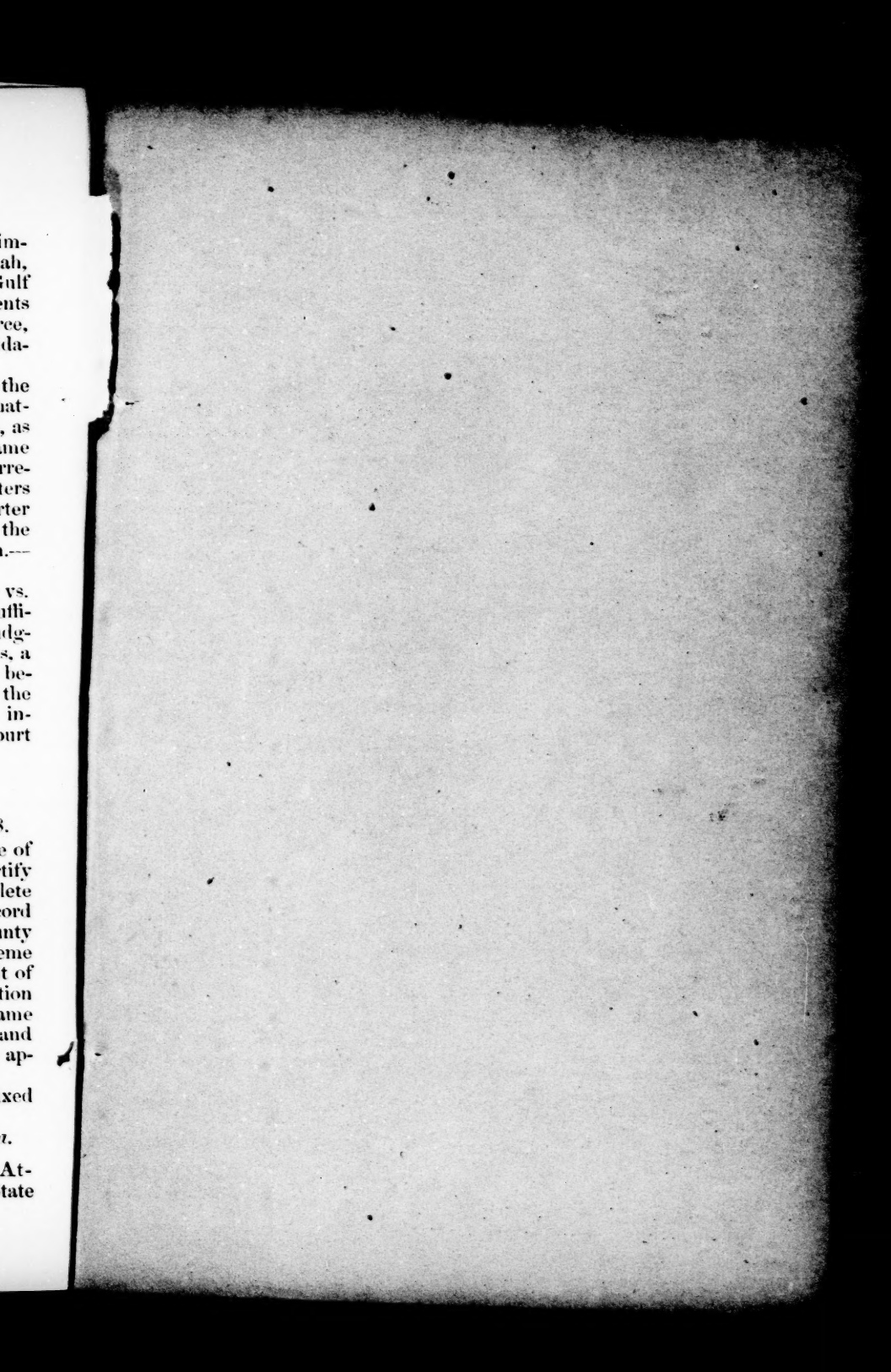
45 CLERK'S OFFICE SUPREME COURT OF GEORGIA,
ATLANTA, GA., *May* 27, 1878.

I, Z. D. Harrison, Clerk of the Supreme Court of the State of Georgia, and as such keeper of the records thereof, do hereby certify that the foregoing pages hereto attached contain true and complete copies of the original bill of exceptions and transcript of the record in the case therein stated from the Superior Court of Fulton County and said state; also of the judgment and decision of the Supreme Court of Georgia in said case, and the original citation and writ of error to the said supreme court, with copies of the original petition for writ of error, and of the original bond for costs, &c., the same constituting a full, true, and complete transcript of the records and proceedings in said case in the Supreme Court of Georgia, as appears from the records now of file in this office.

Witness my signature and the seal of said supreme court, affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clk S. C. Ga.*

(Endorsed on cover:) Georgia Sup. Court. No. 772. The Atlantic and Gulf Railroad Company, plaintiff in error, vs. The State of Georgia. Filed 16th September, 1878.



UNITED STATES SUPREME COURT.

OCTOBER TERM, 1878.

No. 103.

The Atlantic & Gulf Rail Road Co.,

Plaintiff in Error,

vs.

The State of Georgia,

Defendant in Error.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

ROBERT FALLIGANT,
HARTRIDGE & CHISHOLM,
Attorneys for Plaintiff in Error.

[illegible]

SUPREME COURT OF THE UNITED STATES.

The Atlantic and Gulf Rail Road Co., *Plaintiff in Error,*
vs.
The State of Georgia.

IN ERROR: To the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the twenty-fourth day of February, 1874, an Act of the General Assembly of the State of Georgia was approved, entitled "An Act to amend the tax laws of this State so far as the same relate to Rail Road Companies and to define the liabilities of such Companies to taxation, and to repeal so much of the charters of such Companies, respectively, as may conflict with the provisions of this Act." This Act is hereinafter set out at length.

In pursuance of the said Act, a tax execution was issued on the 3d day of October, 1874, against the Plaintiff in Error for Thirty-two Thousand Seven Hundred and Sixty-four $\frac{19}{100}$ Dollars, as its tax for the year 1874.

The Plaintiff in Error resisted the collection of the said tax by filing an affidavit of illegality to the said execution—this being the mode prescribed by said Act—and said illegality was returned to the Superior Court of Fulton County, where it was tried upon an agreed statement of facts, and, on the 23d December, 1874, the said Court ordered and adjudged that the said tax execution should proceed, and that the said Rail Road Company should pay the costs.

The Plaintiff in Error thereupon excepted to said judgment of said Superior Court, and the said suit was carried, by Writ of Error, to the Supreme Court of the State of Georgia, where the said judgment was affirmed.

The said suit in the said Supreme Court having drawn in question the validity of the said Act of the State of Georgia, approved February 24th, 1874, on the ground that the said Act was repugnant to the Constitution of the United States, in this, that it impaired the obligation of contracts, and the said judgment or decision of the said Supreme Court—the highest Court of the State of Georgia—being in favor of the validity of the said Act, the said judgment was brought to this Court on a Writ of Error.

ASSIGNMENT OF ERRORS.

The question for discussion in this case is: Does the said Act of the Legislature of Georgia, approved 28th Feb., 1874, impair the obligations of the charter contracts of the Plaintiff in Error in regard to special exemption from taxation?

That Act is as follows:

Section I. The General Assembly do enact, That from and after the passage of this Act, the Presidents of all the Rail Road Companies in this State shall be required to return, on oath, annually to the Comptroller General, *the value of the property of their respective Companies without deducting their indebtedness; each class or species of property to be separately named and valued,* so far as the same may be practicable, *to be taxed as other property of the people of the State,* and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller General.

Sec. II. Be it further enacted, That said Presidents shall pay to the Comptroller General the taxes assessed upon the property of said Rail Road Companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same in the

manner provided by the law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

Sec. III. Be it further enacted, That if any Rail Road Company affected by the first and second sections of this Act, desires to resist the collection of the tax herein provided for, said Company, through its proper officer, may, after making the return required in the first section of this Act, and after paying the tax levied on such corporation by the Tax Act for 1873, and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities, only the same shall have precedence of all cases in said Court as to time of hearing, and with the same right of motions for new trial and Writs of Error as in other cases of illegality, on the part of the Comptroller General and of said corporation, in which cases the Comptroller General shall be represented by the Attorney General of the State, or such other Attorney as the Governor may select, and if the grounds of such illegality be not sustained the Comptroller General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the Act, and if at any time during the pendency of any litigation, herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller General.

Sec. IV. Repeals conflicting laws.

This Act has been held to be constitutional by the Supreme Court of Georgia, and that it does not impair any

obligations of the State to the Plaintiff in Error. We complain of that decision.

POINTS AND AUTHORITIES.

1.

State Courts, holding temporary commissions, as a general rule, decide all State matters in favor of the State; and whenever the question arises if a State has passed a law impairing the obligations of one of *her own contracts*, this Court, for the protection of the citizen, should be astute in the examination of such a decision, the proper meaning and construction of the contract and the alleged violation thereof, by the light of the intention of the parties at the time the contract was entered into and acted upon in good faith. And this is particularly true when the point raised is not as to the grant of the privilege or exemption from taxation, but as to the right of the State to withdraw or take away such right after it has been granted and she has received the full consideration for which the privilege was originally bargained. Chief Justice Marshall, in *Fletcher vs. Peck*, 6 *Crauch*, 137–138, has eloquently said: "Whatever respect might have been felt for State sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested

a determination to shield themselves and their property from the effect of those sudden and strong passions to which men are exposed. The restrictions upon the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people." The history of recent legislation, constitution making and litigation over the whole country, shows how the feelings and passions of the people have been excited against corporations, and points to the prophetic wisdom of the framers of the Constitution of the United States as described by Chief Justice Marshall. In such cases there are no presumptions in favor of the State.

2.

What is the contract, the obligations of which, it is alleged the State of Georgia created and became pledged to keep inviolate; upon the faith of which, private capital was invested, resulting in the settlement of her wild lands, the development of her resources, and the increase of the value of her taxable property; and which, by the aid of her Courts, this State, after enjoying all the advantages, is now attempting to seriously impair for her own exclusive benefit, and to the irreparable loss and damage of the other contracting parties?

A.

THE ORIGINAL CHARTERS.

Prior to the 18th day of April, 1863, the Rail Road now known as the "Atlantic & Gulf Rail Road," was composed of the "Atlantic & Gulf Rail Road," commonly called the Main Trunk, and a road running north-east from the initial point of the former Road to the City of Savannah, known as the "Savannah, Albany & Gulf Rail Road." The latter Road was incorporated by an Act of the Legislature of Georgia, on the 25th day of December, 1847, and by the first section of said Act, the said Rail Road Company was invested "with all

the rights, privileges and *immunities*, which, by the laws of Georgia, were held or enjoyed by ANY incorporated railroad company or companies.

Pamph. Laws of Ga., 1847, p. 191.
Record, pp. 8–9.

The Atlantic & Gulf Rail Road Company was incorporated by an Act of the Legislature of Georgia, approved on the 27th day of February, 1856, and by the fourth section of said Act, it was declared that all the PRIVILEGES, IMMUNITIES and EXEMPTIONS granted to the Central Rail Road & Banking Company, and the Georgia Rail Road Company, or either of them, by the Acts incorporating said companies, and the several Acts amendatory thereof, were granted to the Atlantic & Gulf Rail Road Company.

Pamph. Laws of Ga., 1856, p. 160.
Record, pp. 8–9.

By the seventh section of the Act of December 20th, 1833, incorporating the Central Rail Road and Canal Company of Georgia, it was declared by the Legislature of Georgia, and affirmed by the eighteenth section of the Act of the Legislature of Georgia, December 14th, 1835, by which the name was changed to the "Central Rail Road and Banking Company;" that *"the said canal or rail road, and the appurtenances of the same, shall not be subjected to be taxed higher than one-half of one per centum upon its annual net income."*

Prince's Digest Laws, p. 300, 332.
Record, pp. 8–9.

By the fifteenth section of the Act of the Legislature of Georgia, approved December 21st, 1833, incorporating the Georgia Rail Road Company, it was declared that "the stock of the said company and its branches, shall be exempt from taxation for and during the term of seven years from and after completion of the said rail roads, or any of them; and after that shall be subject to a tax *not exceeding* one-half per centum per annum on the net proceeds of their investments."

Prince's Digest Laws of Ga., p. 308.
Record, p. 9.

This language, in the Charter of the Central Rail Road and Banking Company of Georgia, has been held to exempt that Company from any taxation different from that mentioned in the said Charter, as aforesaid.

Central R. R. & B. Co. vs. Georgia, 92 U. S., 665.

And the above language in the original Charter of the Georgia Rail Road Company has also been held to extend a similar exemption to that Company.

Georgia vs. Geo. R. R. & Bkg. Co., 54 Ga., 423.

Each of the foregoing decisions were rendered under a tax claimed to have been imposed by the said tax Act of the Georgia Legislature, in the year 1874, the same Act under which the tax is now sought to be enforced against Plaintiff in Error.

Acts of Ga., 1874, p...

The Savannah, Albany & Gulf Rail Road Company and the Atlantic & Gulf Rail Road Company, under their respective Acts of incorporation, performed part of the obligations assumed by each, and constructed their several lines prior to 1860.

Record, p. 8.

And each of them acquired the same exemptions from taxation which were possessed by the Central Rail Road and Banking Company of Georgia, and the Georgia Rail Road Company, and the Legislature could not have taxed them under the said Act of 1874.

Humphry vs. Pegues, 16 Wall, 244.

It is urged, however, that the Savannah, Albany & Gulf Rail Road Company was never granted any exemption from taxation. We submit that this suggestion is untenable. The language of the Charter is that the said Company "are hereby invested with all the rights, privileges and immunities, which, by the laws of Georgia, are held or enjoyed by ANY or the incorporated rail road company or companies." The use

of the word "any" is the same as if each rail road company in Georgia had been named. The case of Humphreys vs. Pegues, supra, should control this point. In the language of Mr. Justice Nelson in "Chicago vs. Sheldon," 9 Wall, 54: "What adds great weight to this view is, that it accords with the practical construction given to the contract by both parties." (From 1847 to 1874, nearly thirty years, no attempt was made to tax the property of the Savannah, Albany & Gulf R. R. Company.) "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves, is entitled to great, if not *controlling influence*. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law; but in an executory contract, and when its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one." The contract under construction in the above case, was contained in a municipal ordinance, by which a rail road company was held to have been relieved of certain assessments upon other citizens.

B.

ACT OF CONSOLIDATION.

The statute called the act of consolidation was passed on the 18th day of April, 1863, after the Code went into operation, and is as follows: "An act to authorize the consolidation of the stock of the 'Savannah, Albany & Gulf Rail Road Company,' and the 'Atlantic & Gulf Rail Road Company,' and for other purposes."

Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same, That the Savannah, Albany & Gulf Rail Road Company, and the Atlantic & Gulf Rail Road Company, be and they are hereby authorized and empowered to consolidate their stocks

upon such terms and conditions as may be agreed upon by the Directors of said Rail Road Companies, and ratified by a majority of the stockholders thereof, and the said Rail Road Companies when so consolidated shall be known as "The Atlantic & Gulf Rail Road Company:" *Provided*, That nothing herein contained shall relieve or discharge either of said Companies from any contract heretofore entered into by either, but this Company shall be liable on the same.

Sec. II. Be it further enacted by the authority aforesaid, That the stockholders of said consolidated Rail Road Companies, by such corporate name and in such corporate capacity, are made capable in law to have, purchase and enjoy such real and personal estate, goods and effects, as may be necessary and proper to carry out the objects herein specified, and to secure the full enjoyment of all the rights herein and hereby granted, and by said name to sue and be sued, plead and be impleaded in any court of competent jurisdiction, to have and use a common seal and the same to alter at pleasure, and to make, ordain and establish such rules, by-laws and regulations as shall seem necessary and convenient for the government and protection of such corporations, the same not being contrary to the laws or constitution of this State; and generally to do and perform and execute all such acts, matters and things, as may appertain to corporations of like character.

Sec. III. And be it enacted by the authority aforesaid, That the several immunities, franchises and privileges *granted* to the said Savannah, Albany & Gulf Rail Road Company, and the Atlantic & Gulf Rail Road Company, *by their original charters* and *the amendments thereof*, and the liabilities therein imposed *shall continue in force*, except so far as they may be inconsistent with this act of consolidation.

Sec. IV. And be it further enacted by the authority aforesaid, That nothing in this act shall be so construed as to *impair* the *covenants* and *obligations* of the Atlantic & Gulf Rail Road Company with and to *the State* of *Georgia*, and that as long as the State of Georgia shall continue to be a stockholder in said consolidated Roads that the seventh and eighth sections of the charter granted to the said Atlantic &

Gulf Rail Road Company, on the twenty-seventh day of February, in the year one thousand eight hundred and fifty-six, shall continue in force, and that the sixth section of said charter shall remain in force permanently: *Provided*, That nothing in this act shall be so construed as to effect or impair any right or rights which connecting rail roads had or were entitled to under the charter of the Atlantic & Gulf Rail Road Company.

Sec. V. And be it further enacted by the authority aforesaid, That *all laws* and *parts of laws militating* against this act, be, and the same are hereby *repealed.*

C.

SECTION 1682.—CODE OF GEORGIA.

On the ninth day of December, 1858, the Legislature of Georgia made provision for the codification of the laws of Georgia; the code "*to embrace in a condensed form the laws of Georgia, whether derived form the common law, the constitution of the State, the statutes of the State, the decisions of the Supreme Court, or the statutes of England of force in this State.*"

Pamphlet Laws of Ga. 1858, p. 95.
Preface to Code of Ga.

Under the powers contained in this act, Commissioners were appointed, who prepared a code which was submitted to a Legislative Committee, and in their report they recommended that the said Code should be adopted as a whole, and also reported an act to accomplish the purpose, which was passed, by which it was enacted "that said Code, revised and fully examined by said Committee, and recommended and reported for adoption (the manuscript whereof now being on file in the Executive Department), be and the same is hereby adopted, as the Code of Georgia; to be of force and take effect on the first of January, 1862."

Pamphlet Laws of Ga., 1860, p. 24.

Owing to certain changes rendered necessary by the Secession Convention, the time limited in which the Code was to

be of force and take effect was extended to the first day of January, 1863.

In the Constitution of Georgia of force in the month of December, 1860, when this adopting statute was passed, there was a provision which required that "*every bill shall be read three times and on three separate days, in each branch of the General Assembly, before it shall pass.*" The Legislative Committee, to avoid this provision, and as a reason why the adopting act would be legal and proper under the circumstances, referring to the said act of 1858, prescribing what the Code should contain, say: "*they present as their unanimous conclusion, that said Commissioners have kept themselves fully and carefully within the pale of the powers and duties conferred.*" They also say: "*if the new Code now presented were a new system of jurisprudence or had the Commissioners attempted to graft upon our system any new features extracted from others and unharmonious with our own, or even if alterations in a well defined public policy had been attempted, your Committee would have paused, hesitated to recommend the mode of adoption suggested, without at least calling the special attention of the Legislature to such new and essential changes.*"

Report of Committe—Code, pp. 4–5.

In that Code there is §1682, which reads as follows: "*Private Charters.—In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise unless such right is expressly negatived in the charter.*"

In the case of the "*West End, &c., Co. vs. Atlanta, &c., Co.,* the Chief Justice of the Supreme Court of Georgia, in speaking of this section of the Code, says: "*this section of the Code introduced a new element into the law of private corporations in this State, and all charters granted since its adoption are subject to its provisions.*"

49 Ga., 158.

If it was a new element, it did not become a part of the law of Georgia by virtue of the said act of 1858, which authorized the codification of existing laws, and the adopting statute of 1860, which accepted and declared of force the manuscript copy of said laws of file in the Executive Office,

upon the faith of the representation of a Legislative Committee that there was nothing in said manuscript except what the act of 1858 authorized to be placed there. All new elements introduced into the law of Georgia by the Code were not legally *adopted* until by the constitution of 1865 the body of laws known as the Code was declared to be law.

In Long vs. Georgia (38 Ga., 509), the Supreme Court of Georgia say: "In the construction of the Code the object of the Legislature is to be kept in view. Without doubt that object was not to make new laws but to codify and make plain the laws already in existence."

This question did not arise in the case of "*The West End, &c., do., vs. Atlanta, &c., Co.* (*supra*), because in that case the charter under discussion was not granted until 1866.

In addition to the view that this §1862, which is an unauthorized interpolation of the laws of Georgia by the codifiers, we submit that it was not read three times in each house as required by the constitution, and that all changes in the old law and all additions of law should have been so read, or they could not be regarded as general laws entering into contracts; and also, that the said acts of 1858 and 1860, and the report of the Legislative Committee may be considered as the title of the Code considered as one act—and if there are any provisions in that Code inconsistent with the title, they are unconstitutional, null and void under the State Constitution. The constitutional provision is, "nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof." The object of this provision was to prevent *fraud* and *surprise* and law smuggling.

Prothro & Kendall vs. Orr et al. 12 Ga., 43.
Savannah vs. State of Ga. 4 Ga., 38.

Would it not be a *fraud* and *surprise* upon the rights of any corporation accepting and acting upon franchises granted after the first of January, 1863, and prior to the Constitution of 1865, to withdraw or modify these franchises without consent, upon the plea that this §1682 smuggled into the Code of Georgia was a general law and became part of the contract?

Will the State be allowed to take advantage of her own *fraud* for her own benefit?

And will this Court hush all inquiry into this fraud, because the Supreme Court of the State, to aid the defendant in error in the consummation of the fraud, has, by implication, held this section to have been law since January, 1863?

Whilst as a general rule this Court will accept as final a direct decision of the Supreme Court of a State upon the State constitutionality of a State statute, we submit that an exception ought to be made where those statutes are claimed to be contracts binding upon others, and the State is seeking advantages for her own use.

In "*New Jersey vs. Yard*," Justice Miller says in 95 U. S. 113-114, "it may safely be said that in far the larger number of cases brought to this Court, the question has been as to the *existence* and *nature* of the *contract*, and not the construction of the law which is supposed to impair it, and the greatest trouble we have had on this point has been in regard to legislative contracts. * * * * Statutes fixing the taxes to be levied on corporations partake in a striking manner of this character, and require for their construction a critical examination of their terms and of the *circumstances* under which they are created."

If §1682, because it was in the Code of 1863, became a part of all private charters thereafter granted, then the State Constitution, also in that Code, the said Acts of 1858 and 1860, and the preface and title to that Code, also became parts of the same charters, and to ascertain the intention of the parties, all of them should be construed together, and neither party should be permitted by technical construction to take any advantage of a fraud or surprise practiced upon the other.

For the reasons already stated, we submit that said §1682 was not such a general law as to become part and parcel of the contract in the act of consolidation; and if we are correct in this view, then the contract that the Rail Roads and appurtenances shall *not* be subject to be taxed higher than one-half of one per centum upon their annual net income, and the contract that the stock of said companies and their branches "shall be subject to a tax *not exceeding* one-half per cent.

Will the State be allowed to take advantage of her own *fraud* for her own benefit?

And will this Court hush all inquiry into this fraud, because the Supreme Court of the State, to aid the defendant in error in the consummation of the fraud, has, by implication, held this section to have been law since January, 1863?

Whilst as a general rule this Court will accept as final a direct decision of the Supreme Court of a State upon the State constitutionality of a State statute, we submit that an exception ought to be made where those statutes are claimed to be contracts binding upon others, and the State is seeking advantages for her own use.

In "*New Jersey vs. Yard*," Justice Miller says in 95 U. S. 113-114, "it may safely be said that in far the larger number of cases brought to this Court, the question has been as to the *existence* and *nature* of the *contract*, and not the construction of the law which is supposed to impair it, and the greatest trouble we have had on this point has been in regard to legislative contracts. * * * * Statutes fixing the taxes to be levied on corporations partake in a striking manner of this character, and require for their construction a critical examination of their terms and of the *circumstances* under which they are created."

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per annum on the net proceeds of their investments," are still of force and parts of the contract; and the Act of 1874, which attempted to alter and change the mode of taxation impairs the obligations of these contracts, and is unconstitutional.

D.

"WITHDRAW THE FRANCHISE."

But if we are in error about the time when the §1682 became the law of Georgia; and this Court should be of the opinion that said section went into operation *legally* on the first of January, 1863, and as such became part of every charter "*thereafter granted*;" then we submit that the proper construction to be placed upon the words of §1682. "The State reserves the right to withdraw *the franchise*" does not give the State the right while continuing the Company in existence, subject to all duties imposed upon it, to deprive it of any franchise which is in the nature of a mere privilege or right attaching to, and an attribute of, the corporate person.

The right to be a corporation, to exist as an artificial person, and to have corporate functions is "the franchise;" to this there may be attached many rights, privileges, and exemptions, and which may be properly denominated property franchises, attached or belonging to the artificial person. The State has reserved the right to withdraw "the franchise to take away life, to cause the dissolution of the artificial person, but not to take away private property without just compensation." The words of a contract, by which a State reserves such a right, ought to be clear and explicit. Even in favor of a Sovereign the power granted or reserved to take life, should not be construed into right to torture, to maim or to ravish.

In the case of "Morgan vs. Louisiana (93 U. S., 217,)" this Court says—(Mr. Justice Field delivering the opinion)—"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous

with rights, privileges and immunities, though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a Rail Road Corporation are rights or privileges which are essential to the operation of a corporation and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights or privileges, without the possession of which the road or the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property; the latter is personal and incapable of transfer without express statutory direction." (p. 223).

Wilmington R. R. vs. Reid, 13 Wall., 268.
Tomlinson vs. Branch, 15 Wall, 465.
Sheils vs. Ohio, 95 U. S., 323.

To ascertain the meaning of the Legislature in §1682, the following section, 1683, should be contrasted with it; the former relates to private charters *hereafter* granted, and the latter to those *heretofore* created. In the first, the right to "withdraw the franchise" is reserved—in the latter, it is declared that they are not subject to dissolution at the will of the State; or, in other words, in charters heretofore granted the franchise can not be withdrawn and dissolution effected unless the right of dissolution is reserved, but in all future grants the right is declared in advance to be reserved.

Section 1683 is as follows: "Private corporations heretofore created without the *reservation of the right of dissolution*, and where individual rights have become vested, are not subject to dissolution at the will of the State." The "reservation of the right of dissolution" seems to have been used as synonymous with the reservation of the right to "withdraw the franchise."

In §1682, "private charter" and "the franchise" are convertible terms. See, also, Code, §1670.

When the State pledged herself, in the Act of 1863, that the Rail Roads and appurtenances should *not* be subjected to be taxed higher than one-half of one per cent. upon their net incomes; and further, that the stocks of said Companies should be subject to pay a tax *not exceeding* one half per cent. on the net proceeds of their investments, "this was a contract relating to something beyond *the franchise.*"

Gordon vs. Appeal Tax Court, 3 How., 133.

The word "*withdraw*" can bear but one construction, viz.: to "*repeal*" the act of incorporation; and the word repeal does not mean to alter, change, &c.

The Attorney-General vs. The Rail Road Cos.
35 Wis., 425.

4.

REPEAL.

If, however, the mathematical idea that the greater includes the less, can be applied to contracts, and the phrase "the franchise" means any one or more of the franchises of a private corporation, and that the State has reserved the right not only to withdraw, but to change, alter, modify, or repeal any one of them; then we submit that §1682 is a legislative and not a constitutional provision and could be also changed, altered, modified or repealed, in whole or in part, by any subsequent Legislature; we also submit that it was clearly the intention of the Legislature of 1863 to repeal that section so far as the right of the State might exist thereunder to thereafter impose a higher tax than one-half of one per cent. upon the annual net income of the plaintiff in error.

We have already considered what were the contracts with the State and the two original companies upon the subject of taxation. The proviso to the first section of the Act of 1863, is "that nothing herein contained shall relieve or discharge either of said companies from any *contract* heretofore entered

into by either, but this Company shall be liable on the same. Sec. III enacted "that the several immunities, franchises and privileges granted to the said Savannah, Albany & Gulf Rail Road Company, and the Atlantic & Gulf Rail Road Company, by their original charters *and the amendments thereof, and the liabilities therein imposed shall continue of force.*

Sec. IV enacted "that nothing in this act shall be so construed as to impair the covenants and obligations of the Atlantic & Gulf Rail Road Company with and to the State of Georgia."

Sec. V. enacted "that all laws, and parts of laws militating against this Act be, and the same are hereby repealed."

We have already argued that the contract or covenant in the original charters that "the railroad and its appurtenances shall not be subjected to be taxed higher than one-half of one per cent. on the net annual income," and that the "stock shall be subject to a tax *not exceeding* one-half per cent. per annum on the net proceeds of their investments," could not be repealed, changed or modified by any subsequent Legislature, without impairing the obligation of the contract. The proviso to the first section of said Act, declares; "that nothing herein contained shall relieve either Company from any contract heretofore entered into; and is an express declaration that the old contract as to taxation is not to be changed. The third section of said Act, prescribing that the *several immunities, franchises and privileges* granted by the original charters, and the liabilities therein imposed, shall *continue of force*, is another express declaration that this contract, this privilege, this franchise, this liability "*not* to be *subjected* to a higher tax than one-half of one per cent. on the net annual income, etc.," shall continue of force, just as they were granted by the original charters, and being irrepealable according to the construction of those charters, continue irrepealable.

This same contract as to taxation is one of the covenants and obligations of the Atlantic & Gulf Rail Road Company, *with* and to the State, and yet the fourth section of said Act declares that nothing therein shall not be so construed as to impair those covenants and obligations.

If it be true, then, that §1682 is to have the construction contended for by the Defendant in Error, and being a general law, is to be taken as a part of the contract contained in the charter of 1863, we submit that only so much of it can be so taken as does not militate against the provisions of said Act of 1863. *All laws* and PARTS of laws *militating* against this Act are repealed.

In the case of *New Jersey vs. Yard*, 96 *U. S.*, 111, Mr. Justice Miller said: "The right asserted in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the Legislature for one particular session or term of the State of New Jersey, cannot bind any succeeding Legislature, which may choose to make a grant or a contract *not subject* to be altered or repealed. * * *"

It follows that, unlike the *Constitutional* provision in other States, it is in New Jersey a question in every case of a contract made by the Legislature, whether that body intended that the right to change or repeal, should inhere in it, or whether, like other contracts, it was perfect and not within the power of the Legislature to impair its obligation."

See also, Home of Friendless vs. Rouse, 8 Wall, 436, 436.
Rail Road Co. vs. Maine, 96 U. S., 510.

5.

NEGATIVE WORDS.

It will be argued that §1682 cannot be repealed in whole or in part in the manner contended for by the Plaintiff in Error. But if that section is to be construed as claimed by the Defendant in Error, and the words "the right to withdraw the franchise," mean the right to "alter, change, modify or repeal" any one or more of the several franchises, and that the Act of Feb. 28th, 1874, which declares that the property of all Rail Roads in the State "shall be taxed as other property of the people of the State," is a proper and legal exercise of the power reserved to the State to withdraw the franchise of exemption from taxation as granted in this case; then we submit that a charter which contains this covenant, "that the Rail Road and its appurtenances *shall not be sub-*

jected to be taxed higher than one-half of one per cent. on the net annual income." and the further provision that the "stock shall be subject to a tax *not exceeding* one-half per cent. per annum on the net proceeds of their investments," is within the exception of Section 1682, and that the said covenants and provisos are express negatives of the right of subsequent Legislatures to impose the tax as provided for in the said Act of 1874.

In the case of the *Central R. R. et al. vs. Georgia*, 92 U. S., Mr. Justice Strong in contrasting the exemption from taxation under the said Act of 1874, of the Central R. R., etc., do., and of the Macon & Western R. R. Co., said of the charter of the latter Company," it had no exemption—it contained *no negative* words, it did not declare that higher taxation should not be imposed at any future time." In the same case the Court decided that the exemption of the Central Rail Road Company did contain *negative* words, and was irrepealable.

The exemption of the Central Rail Road is also the exemption of the Plaintiff in Error.

The words: "The rail road and appurtenances shall *not be subjected* to be taxed higher than one-half of one per cent. per annum on the annual net income," are certainly the negative of the words "the property of said rail roads are to be taxed as other property of the people of the State."

The words taken from the charter of the Georgia Rail Road Company also contain an express negative of the right of any Legislature to increase the taxation beyond one-half per centum per annum on the net proceeds of the investments.

This position is fortified by the words in the third section of the act, which declares that these exemptions granted in the original charters shall "*continue of force.*" If these exemptions from taxation were irrepealable in the original charters, and have been continued of force, just as they were, it follows that they have been declared to be irrepealable in the Consolidation Act, and, if so, the Act contains the provision which expressly negatives the right of the State to take away, to change, or to alter the exemption or to withdraw the franchise.

A charter cannot be irrepealable, and at the same time repealable. An exemption cannot be perpetual, and at the same time temporary. The grant of a franchise cannot be absolute, and at the same time subject to withdrawal at the will of the grantor.

6.

CONSTRUCTION AS A WHOLE.

If, however, we are in error upon all of the foregoing points in regard to §1682; and if it be true that said section became a general law of the State on the first day of January, 1863, and without any fraud, or surprise, or smuggling, became a part and parcel of the contract contained in the Act of April 11, 1863, to consolidate the stocks of the Savannah, Albany & Gulf R. R. Co. and the Atlantic & Gulf R. R. Co., and is to be construed as contended for by the State, we then submit that the original charters, the cotemporaneous action thereon, the said Act of consolidation, and said general law, contained in Section 1682, should all be considered together, and the contract construed according to the intent of the parties.

A.

THE ORIGINAL CHARTERS CONTEMPLATED SUBSTANTIALLY THE SAME SCHEME.

By the Act of December 25th, 1847, the Savannah and Albany Rail Road Company were authorized "to construct a Rail Road communication between the city of Savannah, on the Savannah River, and the city of Albany, on the Flint River, together with such continuation and branches of said road as may be necessary; * * * and with such branch roads towards the North and towards the South from said road to such point or points as they (the corporators) may deem requisite; and the said Company may at any time extend the said road to any point or points on or across the Chatahoochee River."

On the 28th day of November, 1853, the General Assembly of Georgia passed the following preamble and joint resolu-

tion: "Whereas, The Savannah & Albany Rail Road Company has organized, under a charter granted by the State of Georgia, with the purpose, if a charter can be obtained from the State of Alabama, of connecting the Atlantic Ocean at Savannah with the Gulf of Mexico at Mobile, in as nearly as practicable a straight line between the two cities, and such branch roads as may be necessary:

"And whereas, this line, passing through the Southern part of Georgia and Alabama, would be the means of furnishing a very large and fertile district of country which must otherwise remain comparatively undeveloped, easy access to both markets, those of the Gulf and those of the Atlantic;

"And whereas, aside from the great local advantages to the *Termini* and to the intermediate territory of the two States, it will accomplish a purpose in the connection of the Gulf with the Atlantic, which has ever been deemed of great material importance, therefore

"Resolved, by the Senate and House of Representatives of the State of Georgia in General Assembly met, That this General Assembly do respectfully request the General Assembly of the State of Alabama, if deemed consistent with the interests of the State, to grant a charter, authorizing the construction of the Savannah and Albany Rail Road from the line of Georgia, on the Chatahoochee River, to the City of Mobile, Alabama."

On December 20, 1853, the Legislature of Alabama passed the Act for the purposes aforesaid. On February 20th, 1854, the name of the Savannah and Albany Rail Road Company was changed to the Savannah, Albany and Gulf Rail Road Company.

There was no limit to the Capital Stock of this Company.

On the 27th day of February, 1856, the Atlantic and Gulf Rail Road Company was chartered, and in the second section of the Act there is this proviso, "that no iron and no superstructure shall be laid on the said Atlantic and Gulf Rail Road until the Brunswick and Florida Rail Road or the Savannah, Albany and Gulf Rail Road shall have formed a connection with the said Atlantic and Gulf Rail Road,

and the cars be running on one or the other of said Rail Roads."

And by the fourth section of said Act, it was enacted "that when the Atlantic and Gulf Rail Road Company shall be organized, as provided in the previous section of this Act, the said Company shall be authorized, and is hereby declared to have full power to build, construct and maintain a Rail Road for the transportation of produce, merchandise and passengers, from a point as near as practicable to the intersection of the lines of the Counties of Appling, Ware and Wayne, crossing the Satilla River at or near Walker's Ferry in the vicinity of Waresboro; and thence by the most practicable route to the Western boundary of the State of Georgia, at any point between Fort Gaines, in the County of Clay, and the junction of the Flint and Chatahoochee Rivers, in the County of Decatur, said Western terminus to be selected by the Directors after an accurate survey and estimates of cost shall have been made, and with distinct reference to a speedy connection with the Gulf of Mexico at Mobile or Pensacola."

In the fifth section of said Act there is the following language: "But no payment shall be made on the part of the State until the Savannah, Albany & Gulf Rail Road Company, and the Brunswick & Florida Rail Road Company shall have released any right which either of said Companies have or claim, to interfere with the location of said road on account of any privileges granted in the charters of either of them."

And it is enacted by the sixth section of the said Act, "That the Savannah, Albany & Gulf Rail Road Company, and the Brunswick & Florida Rail Road Company, and either of them, shall be permitted to join their tracks with the track of the said Atlantic & Gulf Rail Road Company, with equal privileges to both of said Companies, and without any discrimination whatever against either of them; it being the intention of the State of Georgia by this Act to provide *a main trunk railway* across her territory, *connecting the Atlantic with the Gulf of Mexico;* that any rail road in this State shall have the privilege and right to join to said Atlantic & Gulf Rail Road Company, without discrimination for or against such rail road joining thereto."

The stock of this Company could be increased to five million of Dollars. The State of Georgia became the owner of one million dollars of the stock at par, (ten thousand shares.)

The Act of April 18th, 1863, which authorized these two Companies to consolidate their stocks upon such terms and conditions as may be agreed upon by the Directors of said Rail Road Companies, and ratified by a majority of the stockholders thereof, and which further prescribed that the said *Rail Road Companies*, when so consolidated, shall be known as "The Atlantic & Gulf Rail Road Company," the name already given to the *main trunk* which was to connect the water of the Atlantic Ocean with the Gulf of Mexico, was nothing more than a consummation of the obligations of the charter contracts made by each with the State, and for the performance of which, the State had solemnly pledged that the rail roads and appurtenances of each should "*not* be subjected to be taxed higher than one-half of one per cent. upon the net annual income, etc."

The consideration moving to the State was the connection by rail of the waters of the Atlantic and the Gulf; she invested one million of dollars in the enterprise, and to induce private subscription, declared that there should be a partial exemption from taxation.

Neither corporation alone accomplished the object. The State invited unity; in fact, made it one of the conditions of her subscription that there should be unity. Can it now be urged that the two Companies, to form a more perfect union by accepting the terms of the said Act to consolidate their stocks, upon a vote of the State stock, have been deprived of this exemption, this consideration offered by the State to induce private subscription?

The State has accomplished her purpose, she has the connection, the Savannah and the Flint are contributory to each other—the main trunk has been established, her lands have been developed, taxable values have been increased, and her revenues thereby enlarged. Shall she be permitted to withdraw the partial exemption from taxation granted to each corporation to accomplish the same purpose, because it required the united exertions of the two to complete the con-

tinuous line from the Savannah to the Flint? No additional property is under the shield of protection. The lines of Rail Road are united as the State always intended that they should be, and by the Act of consolidation to perfect the union and to secure beyond peradventure the objects and wishes of the State, they are placed under the management of one Board of Directors, under one name, the old name of the *main trunk*. Such a consolidation would not have relieved the subscribers to the stock of either corporation.

Sprague vs. Illinois River R. R. Co., 19 Ill., 176.
County of Scotland vs. Thomas, 94 U. S., 682.

B.

NO SURRENDER.

Consolidation does not imply the *surrender* of *all* privileges, immunities and franchises, and a *re-grant* of them.

This is always a question of intent. In the case of *Tomlinson vs. Branch*, 15 *Wall.*, 465, Justice Bradley said: "The *keeping alive* of the *rights* and *privileges* of the old Company and transferring them to the new Company in connection with the property, indicates the legislative intent, that such property was holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course these remarks do not apply to those *corporate rights* and *franchises* of the old Company which appertain to *its existence* and *functions as a corporation*—these became merged and extinct. But all its *rights* and *duties, privileges* and *obligations*, as *related* to the *public* or to *third persons*, REMAIN and DEVOLVE upon the new Company." An *exemption* from *taxation* was then held to be one of the latter.

It was also held in *Morgan vs. Louisiana*, 93 *U S.*, 223. The franchise to charge freight or passage is a corporate function, belonging to the former class of rights; becomes extinct on consolidation, and is not transferred or translated, but is conferred by *re-grant* alone.

See also, Sheils vs. Ohio, 95 U. S., 323.

In the case of *Scotland County vs. Thomas*, 94 *U. S., page* 693, the same learned Judge, in discussing the effect of a consolidation, said: "Subscription to the stock was not only a power of the County, but a *privilege of the Company*—being a portion of the rights and privileges which it obtained by *translation* from the charter of the 'North Missouri Rail Road Company.'"

See, also, Cen. R. R. & B. Co. vs. Georgia, 92 U. S., 665.
South Western R. R. Co. vs. Georgia, 92 U. S., 665.
New Jersey vs. Yard, 95 U. S., 111, 112.
Phila., W. & Balt. R. R. Co. vs. Maryland, 10 How., 376.
Branch et al. vs. City of Charleston et al., 92 U. S., 682-3.
Chesapeake & Ohio R. R. vs. Virginia, 94 U. S., 718.

Whether this exemption from taxation, as it existed in the original charters, was a contract, a covenant, an immunity, a privilege, or a liability, it is very clear that it was not the intention of the contracting parties to surrender it and then accept it as a *re-grant*. The proviso to the first section of the consolidating Act declares: "That nothing herein contained shall relieve or discharge either of said Companies from any contract heretofore entered into by either, but this Company shall be liable on the same."

The third section declares: "That the several *immunities, franchises* and *privileges* granted to the said Savannah, Albany & Gulf Rail Road Company and the Atlantic & Gulf Rail Road Company, by their original charters and the amendments thereof, and the *liabilities* therein imposed shall *continue of force.*"

And the fourth section enacts: "That nothing in this Act shall be so construed as to impair the covenants and obligations of the Atlantic & Gulf Rail Road Company with and to the State of Georgia."

If we regard the exemptions from taxation as contracts between the original Rail Road Companies and the State, (and certainly all the decisions so regard and treat them,) then the proviso to the said first section of the said Act, consolidating the stocks, declares that the old companies shall not be re-

lieved or discharged therefrom, and the new company is made liable thereon.

If we consider those exemptions as among several immunities, franchises, privileges and liabilities mentioned in the third section of said act, then we submit that the Act itself declares that they are granted by the *original charters* and the amendments thereof; they are not treated as franchises which became merged, extinct or surrendered, but are declared to be alive as originally granted and *continued of force.*

And if these exemptions are covenants or obligations of the Atlantic & Gulf R. R. Company, with and to the State of Georgia, the fourth section enacts that nothing in said Act shall be so construed as to impair them.

§1682 of the Code refers to *franchises* GRANTED *after its adoption.* If we are correct in assuming that these exemptions from taxation were granted by the original charters and not by the Act of April, 1863, then the said section, though a part of the charter for some purposes, cannot be held as authority for the State to change the mode of taxation as prescribed in the said Act of 1874.

The intention of the parties seems to us too obvious to require further argument. The phraseology of the Act indicates not the *re-grant* of franchises surrendered, but the recognition and confirmation of old franchises formerly granted, acted upon and still retained.

As we submitted in the opening of this brief, the point of construction involved is not whether the State granted an exemption from taxation, but has she constitutionally withdrawn a right previously bestowed. The rule, therefore, that in cases involving the question whether the State has surrendered this right, all presumptions are to be in favor of the State, does not apply. But we submit that if §1682 became part of this contract, so did §2757, and the parties provided rules of construction for themselves; and one of these rules is that "if the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obigation is generally preferred."

In this case the Act of 1863 was made by the State, re-

duced to writing by the State, and executed by the State; it was accepted by a vote of the stockholders, at which election the State cast ten thousand votes. By the terms of the Act the State undertook not to tax except as provided for in the original charters; the State is now seeking to avoid that obligation, and if her right to do so is doubtful, then, according to the rules of construction agreed upon between the parties and made a part of the contract and placed under the people's bill of rights in the Constitution of the United States, that construction should be adopted which goes most strongly against her.

In *Garrison vs. United States*, 7 *Wall.*, 690, Mr. Justice Miller, construing a contract, said: "*Its doubtful expressions should, according to a well known rule, be construed most strongly against the party using the language.*"

It follows that this privilege or exemption from taxation was never surrendered. It was *kept alive and* continued *in force*. The consolidated Company succeeded to the franchises and property of the other Companies, "*took them just as they were,*" although §1682 may have been of force.

Cen, R. R. etc. vs. Georgia, 92 U. S., 675.

The rule seems to be well established that the law of taxation is fixed, not by the charter of the Company succeeding to, but by the charter of the Company parting with, the franchises and property. The Act of consolidation is but the legislative consent that the new Company may acquire these franchises and property "*just as they were.*"

In the case of the *South "Western R. R. Co. vs. Georgia,*" can it be argued that the decision in that case would have been different, if the charter of the South Western R. R. had been granted after the first January, 1863?

In the opinion of the Court the charter of the receiving Company does not regulate the taxation. In that case it was determined by the charter of the Muscogee Rail Road, which became extinct.

92 U. S., 676, 677.

8.

But if we should also be in error as to the effect of the Act of 11th April, 1863, and it should be held that the acceptance of the terms of the Act operated as a surrender of all rights, both corporate and other franchises, and a re-grant of the same, and that at the time of such surrender and re-grant §1682 was a general law, and should be construed as contended for by Defendant in Error, then we submit that the same franchises were re-granted which the old companies possessed,and not only the *same*, but *all* of them. One of these franchises of the old Companies was that the taxation should not be different from the manner *contracted for* in the original charters, and *another franchise* of the old companies expressly declared, in §1683 of the Code, and by an unbroken line of decisions of this Court, as well as of the State Court, was that private rights having vested under those contracts, no subsequent Legislature could change them; this last franchise was a right to have the protection of the "peoples' bill of rights," and to be armed against the State with the shield of Par. 1, Sec. 10, Art. 1 of the Constitution of the United States. If the Act of 1874 can change the manner of taxation, then this last mentioned franchise could not have been re-granted; but the Act of 1863 says: the "*several franchises*," etc., (that is, each and all,) granted by the original charters, shall be continued of force. If this Act of 1863 is in conflict with §1682 then "with respect to charters as well as statutes the rule holds that leges posteriores priores *contrarias* abrogant."

Grant on Corp., m. p. 24.

The rule would be different if §1682 had been in the State Constitution.

A re-grant of an irrepealable franchise would then have been void, because the Legislature would have been without power to pass such laws.

This exemption from taxation was irrepealable in the old charters. It was re-granted just as it was; the Legislature of 1863 had a right to make such a grant, and it is irrepealable in the new charter.

If this be true, the Act of 1874 impairs the obligations of the contract, and is unconstitutional.

9.

SECTION 818 CODE OF GEORGIA.

But if we should be in error in supposing—first, that there were irrepealable contracts in the charters of the Savannah, Albany & Gulf Rail Road Company and the Atlantic & Gulf Rail Road Company before the said consolidation of their stocks—or either of them; and second, that these irrepealable contracts were continued of force and now exist as parts of the charter of the Plaintiff in Error; then we submit that §818 of the Code, digested from the Tax Acts of 1858, became part and parcel of the contract contained in the said Act of consolidation, and granted such an exemption from taxation as could not be repealed or taken away by the said Act of 1874.

A.

Section 818 of the Code is as follows: "*Rail Roads—when to pay one-half of one per cent.* The several Rail Roads by whose charters a higher tax is forbidden, and such as are now or *may hereafter* be in operation, that do not pay a dividend exceeding six per cent., shall pay ONLY one-half of one per cent. upon the net annual income of each *until* they pay a dividend of eight per cent. per annum, in which shall be included the reserved fund—at which time they are to be taxed as other capital."

In the case of *The Raleigh & Gaston R. R. Co vs. Reid*, 13 *Wall.*, 270, Mr. Justice Davis, in delivering the opinion of the Court upon an exemption from taxation expressed in similar language, said: "When a statute limits a thing to be done in a particular mode, it includes the *negative* of the other mode. It was the manifest intention of the Legislature which incorporated this Company to invite the investment of capital in the enterprise of building this road; and no means better adapted for the purpose could have been

devised short of total immunity from taxation. As long as the capital was unproductive it contributed nothing to the support of the government, and even after it became remunerative its contributions were fixed by the terms of the charter, and could not, in any event, exceed twenty-five cents on the share of stock.

"The impolicy of this legislation is apparent, but there is no relief to the State, for the rights secured by the contract are protected from invasion by the Constitution of the United States."

And again, in the case of the *Pacific R. R. Co. vs. Maguire*, 20 *Wall.*, 42, Mr. Justice Hunt, delivering the opinion of the Court, also upon a similar statute, said:

"1st. That the twelfth section of the Act of 1852 created a contract between the State and the Rail Road Company, by which the Rail Road was exempt from taxation *until* it was completed and part in operation, and *until* it should declare a dividend on its capital stock, not however extending longer than two years after its completion. 2nd, That the Ordinance of 1865, imposing a tax of ten per cent. upon the gross earnings before the road was completed and in operation and had declared a dividend, was in violation of the contract, and that the levy for its enforcement was illegal. * * * * This transaction amounted to a contract between the State and the corporation that there should be no taxation of the Company *until* the occurrence of the stipulated events."

The Atlantic & Gulf Rail Road, since consolidation, has never paid any dividends at all, and the occurrence of the event upon which the contract of taxation was entered into, that the Rail Road and appurtenances should be taxed as other capital, has not taken place. See, also, reasoning in Chesapeake & Ohio R. R. Co. vs. Virginia, 94 U. S., 718.

B.

If both Sections 1682 and 818 of the Code are parts of the Act of consolidation, they should be so construed that effect be given to each.

In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all the parts harmonize, if practicable, and give sensible and intelligible effect to each; nor should it be presumed that the Legislature meant that any part of the statute would be without meaning or without force and effect.

Ogden vs. Strong, 2 Paine, 584.
Bishop on Contracts, §579, §580, §593.

§818 must certainly be without meaning, if the occurrence of the event upon which the rail road could be taxed as other capital was the will of the Legislature of 1874, and not the payment of an eight per cent. dividend, as expressly enacted in said §818.

Any construction which would give a practical and sensible effect to each should be adopted. And if the same effect is given to this section, which this Court has already declared to be the meaning of similar clauses in charters, then the Act of 1874 is unconstitutional.

R. FALLIGANT,
HARTRIDGE & CHISHOLM,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

No. 103.

THE ATLANTIC AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

No. 772.

SAME *vs.* SAME.

The original brief of plaintiffs in error was prepared and filed before the order of consolidation of the above cases had been granted.

I.

In addition, therefore, to the original brief, we submit the following point:

The Savannah, A. and G. R. R. Co., and the A. and G. R. R. Co., prior to the said act of consolidation, had issued bonds, some of which were secured by mortgage upon the property. These bonds were sold, and purchased under the contract in the charter, "*that the railroad, and the appurtenances of the same*, shall not be subjected to be taxed higher than one-half of one per cent. upon the annual net

income," and "that the stock of the said railroads and their branches shall be subject to a tax not exceeding one-half per cent. per annum upon the net proceeds of their investments.

The right to tax carries with it the right to destroy.

McCulloch *v.* Maryland, 4 Wheat., 427.

And if the State can now tax this property, or "withdraw the franchise," at the will of the Legislature, she can completely destroy the value of these bonds, and the contracts between the companies and the holders.

"The power to legislate founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested."

Miller *v.* State, 15 Wall., 498.

Holyoke Company *v.* Lyman, 15 Wall., 500.

These bondholders are not stockholders. They have had no voice in the acceptance of the act of consolidation; and of them it cannot be said, "*Consensus facit jus.*" Against them the State cannot withdraw the franchise. It could not dissolve the corporation; and if the greater includes the less, the State, as against them, cannot repeal, change, modify, or alter any one of the minor franchises.

II.

Consolidation, amalgamation, and enlargement.

The Attorney-General in his brief contends that there are two kinds of consolidation or amalgamation: one, in which the original charters and all the franchises thereto belonging become extinct, and are regranted anew by the act of consolidation; the other, in which the charter of one of the companies remains intact and receives the property

and franchises of the other corporation or corporations just as they were, although the corporate existence of these last-named artificial persons becomes extinct.

The first he denominates technical consolidation, and the latter he calls an enlargement of the powers of the corporation whose powers remain intact. Under the former, he classes the cases of

The Philadelphia, Wilmington and Baltimore R. R. Co. *v.* Maryland, 10 How., 377; and

Shields *v.* Ohio, 96 U. S. Rep., 322.

And under the latter, the cases of

The Central R. R. and B. Co. *v.* Georgia, 92 U. S., 655; and

Southwestern R. R. Co. *v.* Georgia, 92 U. S., 676.

We submit that the case at bar comes within the spirit of the decisions in the latter cases. From an examination of the original charters of the Savannah, Albany and Gulf Railroad, and the Atlantic and Gulf Railroad, and of the act of consolidation, it clearly appears that the intention of the State was to enlarge the powers of her "main trunk,"—the Atlantic and Gulf Railroad.

See original brief, pages 20 to 24.

The fourth section of said act of consolidation is as follows:

"And be it further enacted by the authority aforesaid, that nothing in this act shall be so construed as to impair the covenants and obligations of the Atlantic and Gulf Railroad Company with and to the State of Georgia, and that as long as the State of Georgia shall continue to be a stockholder in said consolidated roads that the seventh and eighth sections of the charter granted to the said Atlantic and Gulf Railroad Company on the twenty-seventh day of February, in the year one thousand eight hundred and fifty-six, shall continue in force, and that the sixth section of said charter shall remain in force *permanently;* provided

that nothing in this act shall be so construed as to affect or impair any right or rights which connecting railroads had or were entitled to under the charter of the Atlantic and Gulf Railroad Company."

The sixth, seventh, and eighth sections are as follows:

"Sec. 6. Be it further enacted, That the Savannah, Albany and Gulf Railroad Company, and the Brunswick and Florida Railroad Company, and either of them, shall be permitted to join their tracks with the track of the said Atlantic and Gulf Railroad Company with equal privileges to both of said companies, and without any discrimination whatever against either of them, it being the intention of the State of Georgia by this act, to provide a main trunk railway across her territory, connecting the Atlantic with the Gulf of Mexico, that any railroad in this State shall have the privilege and right to join the said Atlantic and Gulf Railroad Company without any discrimination for or against such railroad joining thereto; provided, that the stockholders thereof build the said road with their own money.

"Sec. 7. Be it further enacted, That it shall be the duty of the President of said Railroad Company, to make returns under oath semi-annually to the Governor of the State, containing a full and accurate statement of the pecuniary affairs of the company, with a list of the subscribers to stock, with the amounts subscribed and paid in by each, which returns shall be filed away in the Comptroller General's office.

"Sec. 8. And be it further enacted, That the produce of the State of Georgia, deposited at any depot within the State, shall have *precedence* over through freights coming from any other State so long as the State of Georgia remains a stockholder in said road."

These provisions indicate a clear recognition of the continuance of the original charter of the Atlantic and Gulf Railroad, and an enlargement thereof by the addition of the stockholders, the property, and property franchises of the Savannah, Albany and Gulf Railroad.

The second section of said act of consolidation is a mere repetition of the corporate rights conferred upon the Atlantic and Gulf Railroad by the first section of said act of 1856, of which there was no necessity, but was put in from an abundance of caution, the charters of the said Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company having already provided for the said line of railroad to connect the waters of the Atlantic with the waters of the Gulf.

See original brief, pp. 20 to 24.

But if we should be in error as to the effect of the act of consolidation being an enlargement of the charter of the Atlantic and Gulf Railroad Company, and that the result thereof was to create a new company, then we submit that there is a third class of cases, not mentioned by the Attorney-General, in which, although the act of consolidation may create a new company, all of the franchises of the old companies are not surrendered. The corporate functions may become extinct, but the franchises, privileges, and immunities, and property attaching to the artificial being, may be kept alive, continued in force, and transmitted to the new company. In the language of this court, through Mr. Justice Strong, in the case of The Central Railroad *v.* Georgia, 92 U. S., p. 675: "The new company succeeds to these franchises and property, and holds them just as they were." This proposition was clearly established in the case of The Southwestern Railroad *v.* Georgia, 92 U. S., pp. 676, 677. In that case, the consolidation was effected after the passage of the code of 1863. The effect of the consolidation was held in that case to extinguish the Muscogee Company, but all its rights, privileges, and property became the rights and property of the Southwestern Railroad Company. Exemption from taxation was one of those privileges; and it was held that it *could not be withdrawn*, and that it was unaffected by the said tax law of 1874.

It is perfectly competent for the Legislature to keep alive and continue of force franchises and privileges previously granted, and to provide against consolidation operating as a surrender of the same, when no constitutional inhibition is in the way.

Railroad Company *v.* Maine, 96 U. S., 512.

In case of Shields *v.* Ohio, 95 U. S., referred to by counsel, there was a provision in the Constitution of the State of Ohio as follows: "That no special privileges shall ever be granted that may not be altered, revoked, or repealed by the General Assembly." And even if the Legislature could have kept alive and continued of force the franchise claimed in that case, there are no words indicating such purpose. In that case, the company, by the original charter, was "empowered to charge such tolls for the transportation of freight and passengers as it might deem reasonable." There were no negative words in the grant, and the franchise was that of a *corporate function*, which became extinct upon consolidation, as argued in original brief, and did not belong to that class which could be kept alive and transmitted to the new or consolidated company just as it was.

Delaware R. R. Tax 18. Wall. 226 227

III

SECTION 1651, CODE 1873.

Counsel of plaintiffs in error did not overlook section 1651, as intimated by counsel for defendant in error. This section had been thoroughly brought to their attention by decisions of the Supreme Court of Georgia, as quoted on pages 36, 37 of Attorney-General's brief. But we complain of those decisions, and say that the Supreme Court of Georgia erred in the construction of the charter contract of plaintiff in error. Said section 1651 reads as follows:

"Persons are either real or artificial. The latter are creatures of the law, and, except so far as the law *forbids* it, subject to be changed, modified, or destroyed."

This is nothing more than the announcement of an old principle, recognized by an unbroken current of the decisions of this court from the Dartmouth College Case down to the present time. The supreme law of the land does *forbid* the Legislature to change, modify, or destroy a corporation, when by so doing the obligations of a contract will be impaired. Section 1682 contains the announcement of a very different principle. In this latter section the State reserves the right to do that which, without the reservation, the law forbids; and in making that reservation the State seems especially to have reserved the right to *destroy*, and to have especially omitted to reserve the right to change or modify.

Delaware R.R. Tax 18 Wall 226

For further authorities showing the distinction between *charters* and *exemptions* therein, see

51 Ga., 573.
~~4 Peters, 562.~~
~~20 Ga., 156.~~
~~12 Ga., 96.~~
~~40 Ga., 230.~~

IV

Repeal of Section 1682.

By third section of act of consolidation, the rights, privileges, immunities, &c., granted by *original* charters are *continued of force*. Their continued existence is most clearly repugnant to the right of the State to discontinue them; and the act of consolidation of April 18, 1863, being repugnant to the general law of section 1682, ~~is the language~~ as intimated by this court in the case of Railroad Company *v.* Maine, 96 U. S., pp. 510, 512, "is not controlled by it, and should not be construed in connection with it."

A fortiori is this true when the said act of consolidation, by the fifth section thereof, expressly repeals all laws and parts of laws militating against its provisions.

In Lane *v.* Morris, 10 Ga., 166, the Supreme Court of

Georgia held that a repealing clause in the following words, "All acts or parts of acts which militate against the intent and meaning of this act be, and the same are, hereby repealed," was an *express* repeal of the repugnant provisions of a former act.

Mr. Toombs, counsel for defendant in error, upon page 2 of his brief says: "The tax act of 1874 repeals so much of plaintiff's charter as may conflict with it,"—thus claiming for repealing clause of tax act what we claim for repealing clause of act of consolidation.

V

"NUDUM PACTUM."

Under this head, we submit in reply section 2740 of code of Georgia, which is as follows:

"A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise."

Also section 2745 of said code, which is as follows:

"A promise of another is a good consideration for a promise. So in mutual subscriptions for a common object, the promises of the others is a good consideration for the promise of each."

The State was a subscriber and owner of 10,000 shares of the stock of the Atlantic and Gulf Railroad, and proposed the act of consolidation, and voted for it.

Further, the State expressly retained, as considerations for herself, the advantages provided in sections 6, 7, and 8 of the charter of the Atlantic and Gulf Railroad Company.

A further consideration was the accomplishment of the original scheme of the State to connect the waters of the Atlantic with those of the Gulf of Mexico, as set forth in all her legislation upon this subject.

It was literally a case of "do ut des"

The "said Companies have always claimed that they were not made net income". Statement of facts Record pp 172-p 12

A tax on income may be graduated as a tax on property. The Delaware R.R. v. Pa. 198 U.S. 341. 232. Knox v. Trimble dow in these Central R.R. v. Ga. 92 U.S. supra & Christensen v. Ohio Ass. Co. 94 U.S. 746.

VI

Railroad Company *v.* Maine, 96 U. S., considered.

In the case at bar, the taxation upon net income was not made dependent upon section 7 of the original charter of the Atlantic and Gulf Railroad. That section simply provided for a semi-annual statement to be made to the Governor of the State, but the taxation was not made dependent upon such statement; and if it were, the said section has been expressly continued of force by the act of consolidation. But in case of Railroad Co. *v.* Maine, cited by Attorney-General this court say, upon pages 508 and 509:

"The conditions upon which the limitation of taxation was prescribed, could be performed *only* while the companies were distinct companies, operating separate lines. Those companies *only* were required to keep an account of their disbursements, expenditures, and receipts for the inspection of the Governor and Council and Committee of the Legislature; their treasurers *only* were bound to render to the Legislature, at the expiration of every year, exhibits under oath of the net profits of their roads; their directors *only* were called upon to make a special report to the Legislature whenever their annual income amounted to 10 per cent. upon the costs and expenses of their roads. It was only upon such report that the Legislature was to determine the portion of the income which should be received in lieu of other taxes. The new company was subject to no such duty of keeping an account of the expenditures and receipts of the original line; its directors were not called upon to make any report as to the income of such line; nor was its treasurer required to make any annual exhibit of the net profits derived from them."

Again, upon page 512 the court say:

"The extent or mode of taxation was made dependent upon information to be imparted by officers who, upon the consolidation of the companies, had ceased to exist."

VII

BRANCH TO LIVE OAK.

This point not raised on the record. By fourth section of act, as quoted on page 3 of Attorney-General's brief, it

is enacted: "That the capital stock issued for the construction of the branch or branches hereinbefore provided for, shall be liable to such rate of taxation as may be fixed from time to time for all other property in this State."

A tax upon stock issued is different from a tax upon the property of a corporation.

Van Allen *v.* The Assessors, 3 Wall., 583

The Delaware R. R. Tax 18. Wall 229, 230

The acts of 1874 and 1875 tax property, and not the stock.

VIII

Novation.

Mr. Toombs contends that section 2724 of code of Georgia, being a general law, also becomes a part of the charter. That section is as follows:

"One *simple* contract as to the same matter, and on no new consideration, does not destroy another between the same parties; but if new parties are introduced by novation, so as to change the persons to whom the obligation is due, the original contract is at an end."

We submit, that if the position assumed by the Attorney-General that there was no new consideration between the State and the stockholders when they accepted the act of consolidation be true, then the above section does not have the effect contended for by the learned counsel. We further submit, that this section of the code, by its express terms, applies to *simple contracts*, and not to *statutory contracts*, which in Lane *v.* Morris, 10 Ga., 166, are held to be in the nature of specialties. X

The obligation in this case is to pay the State the amount of taxes contracted for in the charters; the person to whom the obligation is due, to wit, the State, remains the same, although the number of persons charged with that obligation is increased. Hence, in the case of The Southwestern R. R. Co., 92 Wall., 676, although the number of stockholders

X The common law is of force in Ga except where changed by Statute or decision; and at common law a specialty could only be discharged by bond expressly purporting to discharge the Obligee. Brice Ultra Vires 507.

in the Southwestern R. R. Co. were increased, the person to whom the obligation was due, to wit, the State, remaining the same, there was no novation; there was no destruction of the old contract of taxation with the Muscogee Railroad Company. There can be no novation, unless there is a destruction of the original contract. In charters, as in simple contracts, the parties may, by stipulations between themselves, in entering into a new contract upon the same subject-matter, provide against the death or destruction of the original contract; and this was done in the case at bar. In the eloquent language of the learned counsel of defendant in error, the exemptions from taxation in the original charters "still live;" by contract between the parties they have been continued of force.

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IX

This court is not bound by decisions of State court in construing the contract, and any of the laws forming a part thereof, in this case.

In the case of Township of Pine Grove *v.* Talcott, 19 Wall., 677, 678, the court, through Mr. Justice Swayne, delivering the opinion, say:

"The question before us belongs to the domain of *general jurisprudence*. In this class of cases, this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. * * *

"Were we to yield, in cases like this, to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

And in Olcott *v.* The Supervisors, 16 Wall., 678, the court say, in substance:

"A railroad is a public highway, a road for public use,

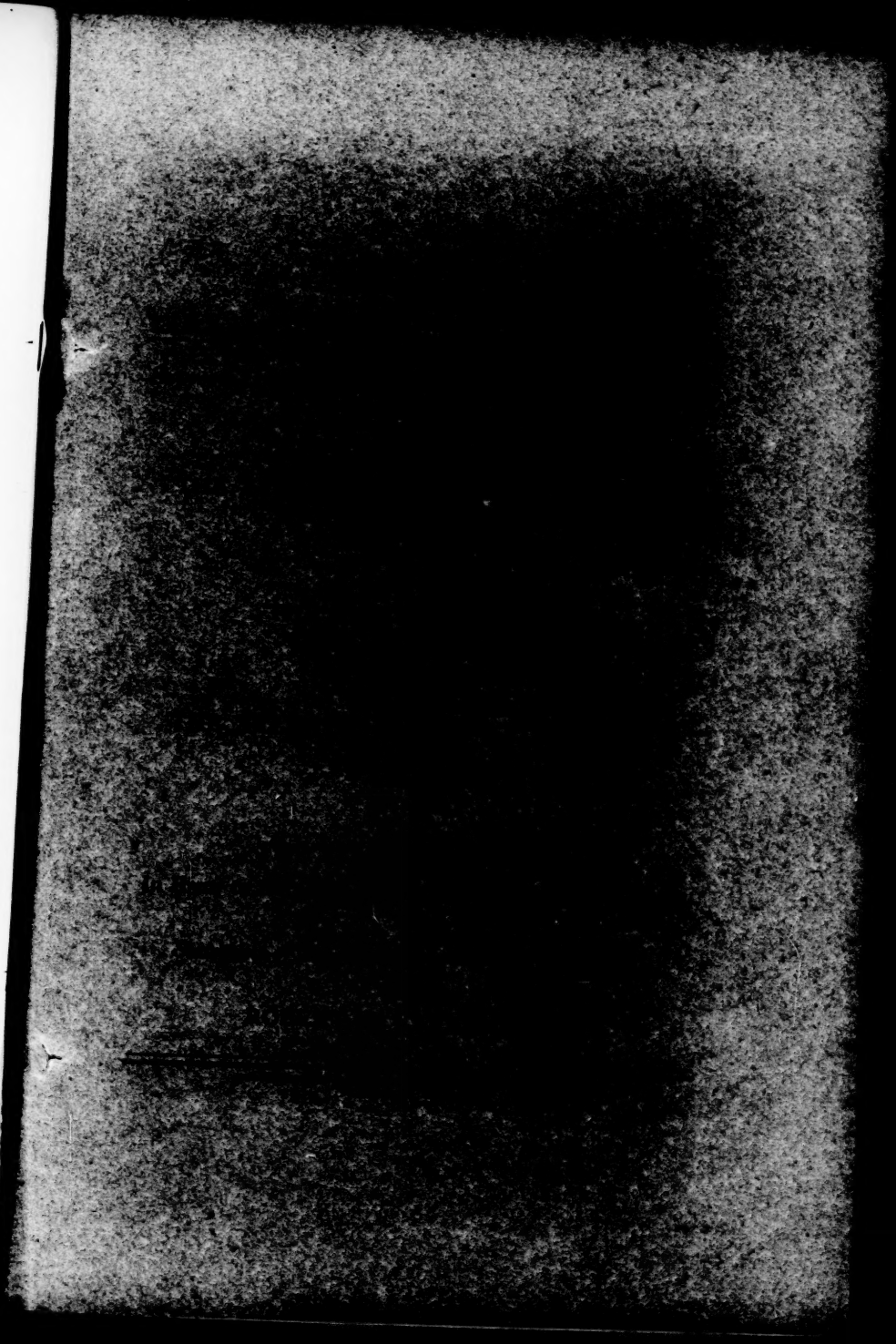
and questions as to the construction of its charter, and matters of taxation in connection therewith, are those of *general law*. They are not local questions peculiar to themselves, in which this court will follow as of obligation decisions of the State courts."

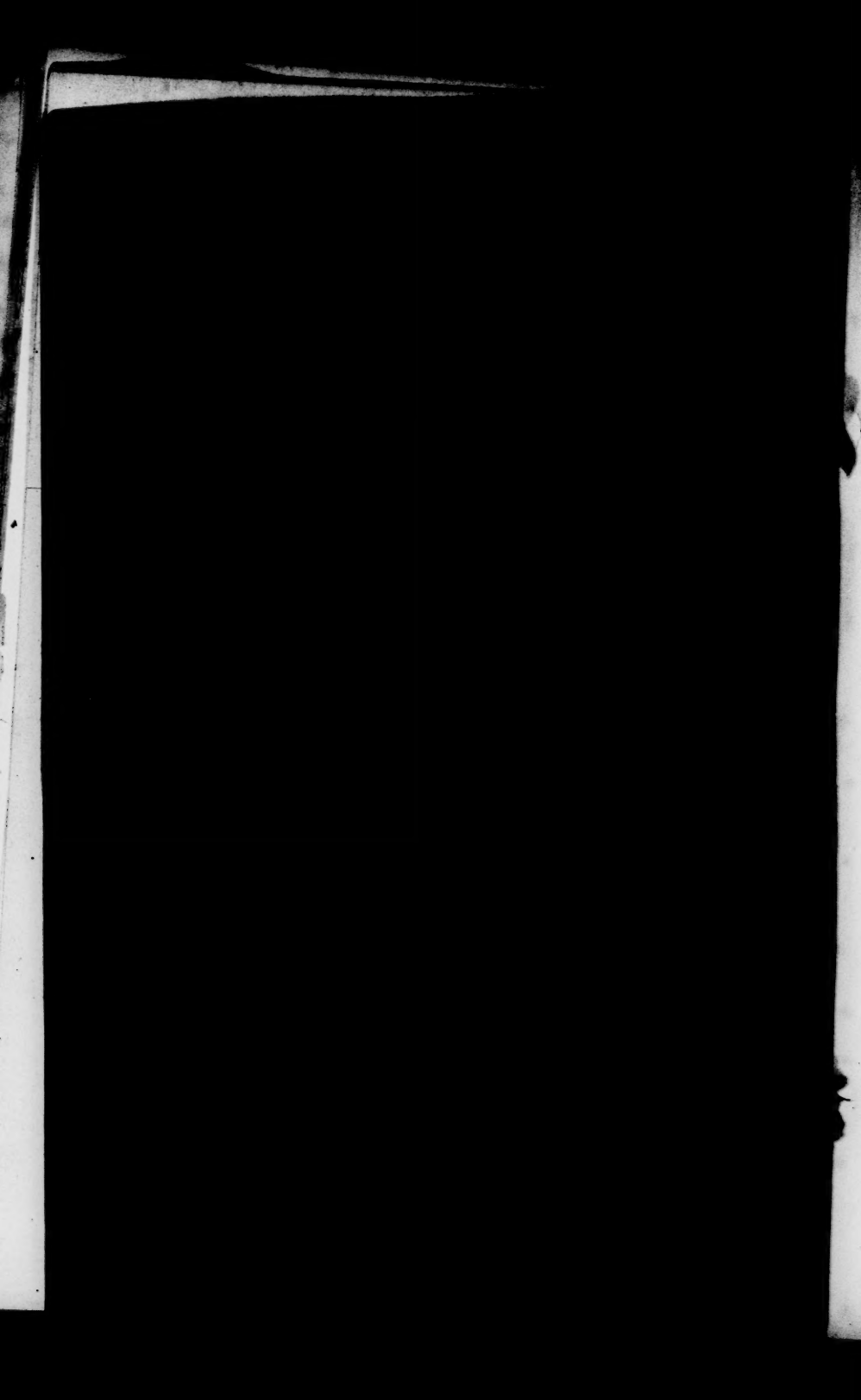
The Savannah, Albany and Gulf Railroad, and the Atlantic and Gulf Railroad, and the Consolidated Atlantic and Gulf, have all issued a large number of commercial securities, which are in the possession of *bona-fide* holders, who have purchased them upon the faith of the pledge contained in the Constitution of the United States, that "no State shall pass any law impairing the obligation of contracts." The stockholders also have invested their money in building and equipping and operating the railways. These investments have added vastly and almost immeasurably to the general business, the commercial prosperity, and the pecuniary resources of the tax-payers of the State.

And in the Township of Pine Grove *v.* Talcott, 19 Wall., 678, the court further say:

"The national Constitution forbids the States to pass laws impairing the obligations of contracts. In cases properly brought before us, that end can be accomplished no more by judicial decision than by legislation."

ROBERT FALLIGANT,
JULIAN HARTRIDGE,
WALTER S. CHISHOLM,
For Plaintiff in Error.





Supreme Court of the United States.

No. 103.

The Atlantic and Gulf Railroad Company, Plaintiff in Error,

vs.

The State of Georgia.

No. 772.

The Atlantic and Gulf Railroad Company, Plaintiff in Error,

vs.

The State of Georgia, in Error to the Supreme Court of the State of Georgia.

Facts from the Record.

The Atlantic and Gulf Railroad Company was formed by the consolidation of the Savannah, Albany and Gulf Railroad Company with the Atlantic and Gulf Railroad Company.

The first named of the old companies was incorporated as "The Savannah and Albany Railroad Company," but was afterwards changed to the name of "The Savannah, Albany and Gulf Railroad Company."

The act incorporating the Savannah and Albany Railroad Company, passed December 25, 1847, was as follows:

AN ACT to incorporate the "Savannah and Albany Railroad Company," with power to extend the said road, and to construct branches; and to amend the acts incorporating the Georgia Railroad and Banking Company.

SECTION 1. *Be it enacted by the Senate and House of Hepresentatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same*, That for the purpose of constructing a Railroad communication between the city of Savannah, on the Savannah River, and the city of Albany, on the Flint River, together with such continuation and branches of said road as may be requisite, Leonidas B. Mercer, Joseph Bond, John Tompkins, Lott Warren, A. B. Lawton, J. M. Mercer, David A. Vason, and such other individuals or corporations as may be associated with them, and their assigns, shall hereafter be a body corporate by the name and style of the Savannah and Albany Railroad Company, and by said corporate name, and in such corporate capacity, they are hereby invested with all the rights, privileges and immunities which by the laws of Georgia are held or enjoyed by any other incorporated Railroad company or companies, subject to the restrictions connected with and necessarily consequent upon such rights, privileges and immunities, for the purposes hereinafter specified.

SEC. 2. *Makes the stockholders individually liable for the debts of the Company to an amount equal to the amount of stock held by them.*

SEC. 3. *Makes it the duty of the Company semi-annually to publish a list of the stockholders and their places of residence, but as these sections were repealed by Act of February* 20, 1854, *it is not necessary to copy them here.*

SEC. 4. *And be it further enacted*, That this incorporation shall continue for the term of thirty years, and no longer.

SEC. 5. *And be it further enacted*, That the object of the Company shall be to construct a Railroad communication between Savannah, or some point on the Central Railroad near Savannah, if the respective Companies shall agree upon a junction of roads, and Albany, on the Flint River, by such route as the said Company may select, with such branch roads towards the north and towards the south, from said road to such point or points as they may deem requisite; and the said Company may at any time extend the said road to any point or points on or across the Chattahoochee River: *Provided*, They shall not obstruct the free navigation of that or any other river which they may cross: *And provided, further*, That they shall not, by such extension, violate the chartered and vested rights of the Southwestern Railroad Company.

SEC. 6. *And be it further enacted*, That the said Company shall pass such by-laws, for the regulation of its affairs, as are not inconsistent with the provisions of this act, the Constitution of this State, or of the United States.

SEC. 7. *And be it further enacted*, That if said Company shall not in good faith have commenced said road by the first day of November, eighteen hundred and forty-nine, or shall not have completed the same within six years thereafter, the rights, privileges and immunities herein granted shall be forfeited.

Approved December, 25, 1847.

November 20, 1851, an act was passed extending the charter to the term of thirty years from the completion of said Road and its branches. (Acts of 1851—52, page 132).

February 20, 1874, an act was passed changing the name of the company to that of the Savannah, Albany and Gulf Railroad Company. (Acts1853—54, page 454.)

On the 19th day of December, 1859, the following act was passed, affecting this company, as well as the Atlantic and Gulf Railroad Company:

An act to amend the several acts of the General Assembly, relating to the Savannah and Albany Railroad Company, and the Savannah, Albany and Gulf Railroad Company, and to authorize the said Company to construct branch roads to the boundary line between Georgia and Florida.

SECTION 1. Be it enacted, etc., That the Savannah, Albany and Gulf Railroad Company are hereby authorized to construct a road or roads from any point or points on their line or the line of the Atlantic and Gulf Railroad Company, to such place or places on the boundary line between Georgia and Florida, as the said Company may select; and that said Company shall have, for these purposes, all the rights and powers conferred by their charter of incorporation and the acts amendatory thereto.

SEC. 2. Be it further enacted, That in all future elections and meetings of the stockholders of said Company, the number of votes to which each stockholder shall be entitled, shall be in proportion to the number of shares he shall hold, in the following proportion, viz: For one share, one vote; for two shares and not exceeding five, two votes; for every five shares above five, one vote; provided, that no person or body politic shall be entitlad in his, her or their own right, to more than one hundred and twenty votes; and no share shall confer a right of suffrage which shall not have been holden, according to the rules of the Company, three months previous to the day of election.

SEC. 3. Be it further enacted, That not less than five Directors, with the President, or the President *pro tem.*, shall form a Board for the transaction of business.

SEC. 4. Be it further enacted, That the capital stock issued for the construction of the branch or branches hereinbefore provided for, shall be liable to such rate of taxation as may be fixed from time to time for all other property in this State.

Approved December 19, 1859.

On the 27th day of February, 1856, an act was passed incorporating the Atlantic and Gulf Railroad Company, as follows:

An act to incorporate a Railroad Company to be called the Atlantic and Gulf Railroad Company, and for other purposes therein named Approved February 27th, 1856.

Section 1. Be it enacted, etc., That James Hamilton Couper, James P. Screven, Alexander Atkinson, Edward C. Anderson, W. B. Hodgson, Robert Stafford, Levi J. Knight, E. Young, William Ponder, Winborn J. Lawton, Alfred H. Colquitt, Joseph Bond, E. A. Nisbet, Joel Crawford, John H. Howard, Seaborn Jones, David J Bailey, Charles J. Jenkins, John Milledge, James M. Calhoun, Charles Spalding, Charles J. Munnerlyn, Thomas Hamilton, N. W. Collier, and James McRae, and such persons as may hereafter become associated with them, and their successors, are hereby

made a body politic and corporate by the name and style of the Atlantic and Gulf Railroad Company, to be located in Milledgeville, and by that name are made capable in law to have, purchase, and enjoy such real and personal estate, goods, and effects as may be necessary and proper to carry out the objects herein specified, and to secure the full enjoyment of all the rights herein and hereby granted, and by said name to sue and be sued, plead and be impleaded in any court of competent jurisdiction, to have and use a common seal, and the same to alter at pleasure; and to make, ordain and establish such rules, by-laws and regulations as shall seem necessary and convenient for the government and protection of said corporation, the same not being contrary to the laws or constitution of this State, and generally to do, perform and execute all such acts, matters and things as may appertain to corporations of like character.

Sec. 2. Be it further enacted, That the persons hereinbefore named, or any five or more of them, shall cause books of subscription to be opened in Milledgeville, and such other place or places as they may designate on public advertisement of thirty days in one or more gazettes of Milledgeville, Savannah, Macon and Augusta, which books shall be kept open at least two weeks, and as much longer as said commissioners may deem expedient, and any person, firm, or corporation desiring to make a *bona fide* subscription to the capital stock of said company shall be permitted to do so; provided, that no one person, firm or corporation shall subscribe more than two hundred thousand dollars previous to the first election of directors, and if the sum of six hundred thousand dollars or upwards shall have been *bona fide* subscribed, it shall be the duty of the commissioners herein named, or any five or more of them, who may be actually engaged in taking subscriptions, to return a list of the subscribers, and the amount subscribed by each, with a certificate that the subscriptions are *bonæ fide* and binding, and that each person, firm or corporation (in the opinion of said commissioners), will be fully able to pay up the sums subscribed by the same, which return and certificate shall be under oath, and when received, shall be filed away in the Comptroller General's office. If said return and certificate shall be satisfactory to the Governor of this State for the time being, it shall then be his duty to subscribe in the name of the State of Georgia for stock to the extent of five hundred thousand dollars, or if the *bona fide* subscriptions returned and certified shall exceed six hundred thousand dollars, then for such larger sum than five hundred thousand dollars as will be in the same proportion; Provided, that no iron and no superstructure shall be laid on said Atlantic and Gulf Railroad until the Brunswick and Florida Railroad, or the Savannah, Albany and Gulf Railroad, shall have formed a connection with the said Atlantic and Gulf Railroad, and the cars be running upon one or the other of said railroads. And provided further, that nothing in this act contained shall be so construed as to authorize subscriptions upon the part of the State of Georgia to exceed one million of dollars. The capital stock of said company may be increased ve millions of dollars, divided into shares of one hundred dollars ch, and in all elections of directors and meetings of stockholders, h share shall be entitled to one vote.

c. 3. Be it further enacted, That so soon as the sum of one n one hundred thousand dollars or upwards shall have been bed as provided in the second section of this act, it shall be

the duty of the Governor of the State for the time being to order an election for nine directors, which election shall be held in Milledgeville under the direction of the commissioners, or any five or more of them, after not less than thirty days notice, and the stockholders shall vote in person or by proxy. The directors so elected shall elect a president from their number [and such other officers as they may deem expedient], and shall hold their offices for one year, and until their successors shall be elected. Elections for directors (after the first), shall take place annually on the second Monday in February. No person shall be eligible as a director except a resident of the State of Georgia, who shall be a holder in his own right and name of twenty-five shares of one hundred dollars each of the stock of said company.

Sec. 4. Be it furtner enacted, That when the Atlantic and Gulf Railroad Company shall be organized as provided in the previous section of this act, the said company shall be authorized and is hereby declared to have full power to build, construct, and maintain a railroad for the transportation of produce, merchandize and passengers' from a point as near as practicable to the intersection of the lines of the counties of Appling, Ware and Wayne, crossing the Satilla river at or near Walker's ferry in the vicinity of Waresboro, and thence by the most practicable route to the western boundary of the State of Georgia, at any point between Fort Gaines in the county of Clay, and the junction of the Flint and Chattahoochee rivers, in the county of Decatur; said western terminus to be selected by the directors, after an accurate survey and estimates of cost shall have been made, and with a distinct reference to a speedy connection with the Gulf of Mexico at Mobile or Pensacola, all questions growing out of the right of way, and damages herefor, to be decided according to the provisions of the fifteenth section of the amended charter of the Central Railroad and Banking Company of Georgia, approved the fourteenth day of December, eighteen hundred and thirty-five, which section is declared to be a part of this act, and all the privileges, immunities and exemption granted to the Central Railroad and Brnking Company, and the Georgia Railroad and Banking Company, or either of them, by the acts incorporating said companies, and the several acts amendatory thereof, are hereby granted to the said Atlantic and Gulf Railroad Company, so far as the same can be made applicable to said Atlantic and Gulf Railroad Company.

Sec. 5. Be it further enacted, That it shall be the duty of the board of directors, soon after they are elected, to call for an instalment of twenty per centum on the capital stock subscribed, by giving at least thirty days notice, and when the same shall be actually paid in, to certify the same t· the Governor of the State for the time being, whose duty it shall then be to pay up twenty per cent. of the subscription made by the State, and for this purpose he is authorized to draw his warrant on the treasury for any money not otherwise appropriated, and if there shall be no such funds in the treasury, or not sufficient to pay the installment called for, he shall issue and dispose of bonds of the State of Georgia, having twenty years to run, and bearing six per cent. interest, with coupons attached, made payable either at the treasury, or at such other place as the Governor may think best to insert in said bonds; and the proceeds of the Western and Atlantic Railroad, after deducting the expenses of the said road, and after the payment of all other sums for which the same has been set apart and pledged, shall be ap-

plied to the payment of the principal and interest on these bonds, but under no circumstances shall any of these bonds be sold below their par value. But no payment shall be made on the part of the State until the Savannah, Albany and Gulf Railroad Company, and the Brunswick and Florida Railroad Company shall have released any right which either of said companies have or claim to interfere with the location of said road, on account of any privileges granted in the charters of either of them. After the first instalment is paid by the subscribers, no more than ten per cent. shall be called for at any one time, and then only on thirty days public notice, and if any subscriber shall fail to pay any instalment duly called for by the directors, the directors may declare the stock of such subscriber forfeited to the company, with any instalments then paid, without affecting the right of said company to sue for and recover the amount of any subscription, or any part thereof, duly called for and remaining unpaid. The Board of Directors shall be authorized from time to time to receive additional *bona fide* subscriptions to capital stock, until the road is finished, and when such subscriptions shall be returned and certified to the Governor under oath, he shall subscribe an additional sum for the State of Georgia, in the proportion as heretofore provided, the instalments to be paid upon the same conditions and in the same manner as authorized for the first subscriptions. But no stockholder shall be allowed a vote, (after the first election,) on which twenty per cent. has not been paid.

Sec. 6. Be it further enacted, That the Savannah, Albany and Gulf Railroad Company, and the Brunswick and Florida Railroad Company, and either of them, shall be permitted to join their tracks with the track of the said Atlantic and Gulf Railroad Company with equal privileges to both of said companies, and without any discrimination whatever against either of them, it being the intention of the State of Georgia by this act, to provide a main trunk railway across her territory, connecting the Atlantic with the Gulf of Mexico, that any railroad in this State shall have the privilege and right to join the said Atlantic and Gulf Railroad Company without any discrimination for or against such railroad joining thereto; provided, that the stockholders thereof build the said road with their own money.

Sec 7 Be it further enacted, That it shall be the duty of the President of said Railroad Company, to make returns under oath semi-annually to the Governor of the State, containing a full and accurate statemeut of the pecuniary affairs of the company with a list of the subscribers to stock, with the amounts subscribed and paid in by each, which returns shall be filed away in the Comptroller General's office

Sec. 8. And be it further enacted, That the produce of the State of Georgia, deposited at any depot within the State, shall have *precedence* over through freights coming from any other State so long as the State of Georgia remains a stockholder in said road.

Sec. 9 (Repeals conflicting laws.)

Acts of 1855 *and* 1856, *page* 158.

The 18th section of the act of 1835 relating to the question of taxation of the Central Railroad and Banking Company, provided—

"That the said railroad, and appurtenances of the same, shall not be subjected to be taxed higher than one-half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of the said company, within the jurisdiction of said corporation, in the ratio of taxation of like property."

In the case of the Georgia Railroad and Banking Company, it had been provided in the charter thereof, that—

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completoin of said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half of one per centum per annum, on the net proceeds of their investments."

The Charter of the Southwestern Railroad, incorporated in 1845, provided—

"That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be subject to be taxed higher than one-half of one per cent. upon its annual net income."

The Code of Georgia which went into operation January 1st, 1863, has the following provisions:

Section 1651: "Persons are either natural or artificial. The latter are creatures of the law, and except so far as the law *forbids* it, subject to be changed, modified or destroyed, at the will of the creator; they are called corporations."

Section 1682: "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

Section 1683: "Private corporations heretofore created, without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State."

Section 1672: "A public corporation is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose, such as municipal corporations."

Section 1673: "All others are private, whether the object of the incorporation be for public convenience or individual profit, and whether its purpose be, in its nature, civil, religious, or educational."

Section 1684: Every corporation is dissolved, 1st, by expiration of its charter; 2d, by forfeiture of its charter; 3d, by a surrender of its franchises; 4th, by the death of all of its members without provision for a succession.

On the 18th of April, 1863, the following act was passed, consolidating the Savannah, Albany and Gulf and the Atlantic and Gulf Railroad Companies:

"An act to authorize the consolidation of the stocks of the Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, and for other purposes.

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, That the Savannah, Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Company be, and are hereby, authorized and empowered to consolidale their stocks, upon such terms and conditions as may be agreed upon by the directors of said railroad companies, and ratified by a majority of the stockholders thereof; and the said railroad companies, when so consolidated, shall be known as 'The Atlantic and Gulf Railroad Company'; Provided, That nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into by either, but this company shall be liable on the same.

"Sec. 2. Be it further enacted by the authority aforesaid, That the stockholders of said consolidated railroad companies, by such corporate name and in such corporate capacity, are made capable in law to have, purchase and enjoy such real and personal estate, goods and effects, as may be necessary and proper to carry out the objects herein specified, and to secure the full enjoyment of all the rights herein and hereby granted; and by said name to sue and be sued, plead and be impleaded, in any court of competent jurisdiction, to have and use a common seal, and the same to alter at pleasure, and to make, ordain and establish such rules, by-laws and regulations as shall seem necessary and convenient for the government and protection of said corporation, the same not being contrary to the laws or Constitution of this State, and generally to do and perform and execute all such acts, matters and things as may appertain to corporations of like character.

"Sec. 3. And be it further enacted by the authority aforesaid, That the several immunities, franchises and privileges granted to the said Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, shall continue in force, ex-

cept so far as they may be inconsistent with this act of consolidation.

"Sec. 4. Be it further enacted by the authority aforesaid, That nothing in this act shall be so construed as to impair the covenants and obligations of the Atlantic and Gulf Railroad Company with and to the State of Georgia, and that so long as the State of Gergia shall continue to be a stockholder in said consolidated roads, that the seventh and eighth sections of the charter granted to the said Atlantic and Gulf Railroad Company, on the twenty-seventh day of February in the year one thousand eight hundred and fifty-six, shall continue in force, and that the sixth section of such charter shall remain in force permanently; Provided, That nothing in this act shall be so construed as to affect or impair any rights which connecting railroads had, or were entitled to, under the charter of the Atlantic and Gulf Railroad company.

"Sec. 5. Repeals conflicting laws.

"Assented to April 18th, 1863." (Acts of 1862—63, page 223.)

On the 28th of February, 1874, the General Assembly of Georgia enacted: the following law

"An act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act.

SECTION 1. *The General Assembly do enact*, That from and after the passage of this Act, the Presidents of all the railroad companies in this State shall be required to return, on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to the taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General.

"SEC. 2. *Be it further enacted*, That said Presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the tax so assessed, the Comptroller General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

SEC. 3. *Be it further enacted*, That if any railroad company affected by the first and second sections of this Act desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the

first section of this Act, and after paying the tax levied on such corporation by the tax act of 1873, and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton county, to be there determined as other illegalities, only the same shall have precedence of all cases in said court, as to time of hearing, and the same rights of motions for new trial and writs of error as in other cases of illegality, on the part of the Comptroller General and of said corporation, in which cases the Comptroller General shall be represented by the Attorney General of the State, or such other attorney as the Governor may select, and if the grounds of such illegality be not sustained, the Comptroller General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of this Act, and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller General.

"SEC. 4. Repeals conflicting laws."

Approved, February 28, 1874.

On the 3d of March, 1875, in the General Tax Act, the following section was included:

SEC. 12. Be it further enacted by the authority aforesaid, That nothing contained in this Act shall be so construed as to alter, change, or repeal an act approved February 28, 1874, entitled an act to amend the tax laws of the State, so far as the same relates to railroad companies, and to define the liability of such companies to taxation, and for other purposes, but said act is hereby ratified and confirmed, with the following amendments thereto, and which is hereby declared to be an amendment to, and made by this Act, a part of said act, approved February 28, 1874, entitled an act to amend the tax laws of this State, and for other purposes therein named. And all railroad companies of this State shall be taxed upon their property as provided by the act of February 28, 1874, and hereafter should said companies, respectively, resist the payment of said *ad valorem* tax upon their property, under the provision of section 3 of the act of February 28, 1874, they shall, in addition to the return required in section 1 of said act, make a return of all their gross income or receipts, and of their net income, also to the Comptroller General, and shall pay a tax equal to the highest amount limited in their respective charters, and in accordance with the terms of their said charters, to be ascertained by the Comptroller General, as a condition precedent to the right to contest their payment of said tax upon the property.

SEC. 13. Repeals conflicting laws.

Approved March 3, 1875.

The Atlantic and Gulf Railroad Company made a return of its taxable property, but refused to pay the tax assessed, and the Comptroller General, in accordance with the law, issued an execution therefor ($32,764 79), which was levied upon certain real estate in the city of Savannah.

The company filed an affidavit of illegality upon the following grounds :

STATE OF GEORGIA
vs.
THE ATLANTIC & GULF RAILROAD COMPANY.

Tax fi. fa & levy in Chatham Co. returnable to Fulton County.

And now comes the Atlantic and Gulf Railroad Company, the defendant in said fi. fa., and saith that the said fi. fa. hath been levied on the lots numbers twenty-three (23) and twenty-four (24), Atlantic ward, city of Savannah, the preperty of this defendant in the county of Chatham and State of Georgia, and that the said fi. fa. is proceeding illegally, because the defendant saith :

First. Because said fi. fa. has been levied on the real estate of this defendant, located in the said county of Chatham, by the sheriff of said county of Chatham, and that the fi. fa. is made returnable to the Superior Court of Fulton county, for the trial of any affidavit of illegality filed thereto, against which this defendant saith the Superior Court of Fulton county has no jurisdiction which will authorize it to try an issue, upon an affidavit of illegality filed to the levy by the sheriff of Chatham county, upon real estate located in Chatham county, and this defendant insists that the Superior Court of said county of Chatham, being a court of general jurisdiction in this State, is the proper court to try said issue of illegality-the more especially as this defendant has no real or personal property, nor any office or place of business or agency in said county of Fulton, but its principal office and place of business is located in said county of Chatham.

This defendant protesting against the jurisdiction of the Superior Court of Fulton county to try the issue in the above case, saith,

Secondly. That by the charter of incorporation of this defendant granted December 25th, 1847, it was declared that this defendant was invested with all the rights, privileges and immunities which by the laws of Georgia are held and enjoyed by any other incorporated railroad company or companies within the State ; that by the 18th section of the act of incorporation of the company now known as the Central Railroad and Banking Company of Georgia (then the Central Railroad and Canal Company), approved December 14th, 1825, it was declared that "the railroad and appurtenances of the same shall not be subjected to be taxed higher than one-half of one per centum upon its net annual income," and further that by the act of incorporation of the Atlantic and Gulf Railroad Company of the 27th of February, 1856, it was declared that the original Atlantic and Gulf Railroad Company should be entitled to all the privileges, immunities and exemptions granted to the Central Railroad and Banking Company, and the Georgia Railroad and

Banking Company, or either of them, by the acts incorporating said two companies, and that one of the exemptions to the said two companies was that the said railroads and their appurtenances should not be taxed by the State of Georgia higher than one-half of one per centum upon their annual net income.

And, further, that by the consolidating act of the Savannah and Albany Railroad Company and the original Atlantic and Gulf Railroad Company, passed in 1863, the immunities and exemptions of each and both of said companies were reserved to the consolidated company; and one of the immunities and exemptions reserved to each of said companies before consolidation was that they should not be taxed by the State more than one-half of one per centum upon their annual net income, and that the stockholders of this defendant subscribed and paid their money for the construction of the road of the defendant, and its appurtenances, upon the faith of the terms of the charter granted by the State to this defendant, and that the provisions contained in said charter have never been repealed or changed with the consent of this defendant or its stockholders; that the tax levied upon the property of this defendant is a tax on its railroad and appurtenances, and is in excess of one-half of one per centum of its net income.

And this defendant further saith, during the year 1873 it earned no net income, and that there was no tax levied on this defendant by the tax act of 1873.

Third. That there is no valid law of the State of Georgia under which the tax fi. fa. in the above mentioned case was issued; and that the act of the Legislature of Georgia, approved on the 28th day of February, 1874, entitled "An act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charter of such companies, respectively, as may conflict with the provisions of this act," is void and of no legal effect, in this, that the said act attempts to repeal a material portion of the charter of this defendant, and to impose upon the railroad of this defendant, and the appurtenances of the same, another and a greater tax than one-half of one per centum per annum on the net income of the same, in which the said act is in conflict with the act of incorporation of this defendant; and further, is in conflict with paragraph 1, section 10, article 1 of the Constitution of the United States, inasmuch as it is an act impairing the obligation of the contract between the State of Georgia and this defendant and its stockholders.

And this defendant further says that this affidavit is not interposed for the purpose of delay, but *bona fide* in defense of the rights of this defendant against the levy of said tax fi. fa.

Personally appeared, John Screven, President of the Atlantic and Gulf Railroad Company, the above-named defendant, who, being duly sworn, deposes and says that the facts stated in the above affidavit are true.

JOHN SCREVEN,
President of the Atlantic and Gulf R.R. Co.,
the above named defendant.

Sworn to and subscribed before me this second day of November, 1874.

J. J. ABRAMS,
Justice of the Peace, Chatham County, Ga.

Filed in office Nov 30th, 1874.

J. D. COLLINS, C. F. C.

The following was the agreed statement of facts on the trial:

In Fulton Superior Court, State of Georgia.

Tax fi. fa., levy and affidavit of illegality and bond filed by def't.

THE STATE OF GEORGIA
vs.
THE ATLANTIC & GULF RAILROAD COMPANY.

Upon the trial of the above cause, the following facts are agreed upon by counsel of plaintiff and defendant as the facts to be presented on the issue between the parties:

1st. That the Savannah and Albany Railroad Company was incorporated by an act of the Legislature of Georgia on the 25th day of December, 1847, and that by the first section of the said act of incorporation the said railroad company was invested with all the rights, privileges and immunities which, by the laws of Georgia, were held or enjoyed by any other incorporated railroad company or companies. (See Pamphlet Laws of Georgia, 1847, p. 191.)

2d. That the Atlantic and Gulf Railroad Company was incorporated by an act of the Legislature of Georgia, approved on the 27th day of February, 1856; by the fourth section of which act it was declared that all the privileges, immunities and exemptions granted to the Central Railroad and Banking Company, and the Georgia Railroad and Banking Company, or either of them, by the acts incorporating said companies, and the several acts amendatory thereof, were granted to the Atlantic and Gulf Railroad Company. (See acts P. M. P., 1856, p. 160.)

3d. That the said two railroad companies, under their respective acts of incorporation, constructed their several lines prior to 1860.

4th. That on the 18th day of April, 1863, the Legislature of Georgia passed an act authorizing the consolidation of the stocks of the Savannah, Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Company, which act was to be ratified by a majority of the stockholders of the said two companies, and by the third section of which act it was declared "that the several immunities, franchises and privileges granted to the said Savannah, Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Company by their original charter, and the amendments thereof, and the liabilities therein imposed shall continue in force, except so far as they may be inconsistent with this act of consolidation." (See Pam. Laws, 1863, p. 223.)

5th. That for years before, and at the time of the passage of the act of consolidation of said two companies in April, 1863, the State of Georgia was a stockholder in said original Atlantic and Gulf Railroad Company to the extent of one million of dollars, and that in June, 1863, the State of Georgia voted for said consolidation, casting therefor ten thousand votes, that being the number of shares then held by the State.

6th. That the State of Georgia is now, and was at the time of the levy of said tax fi. fa., a stockholder in said consolidated company to the amount of one million dollars, representing ten thousand shares of the stock of said consolidated company.

7th. That there has been no act of the Legislature of Georgia since April, 1863, affecting said companies as consolidated.

8th. That the defendant made or received no net income in the year 1873.

9th It is agreed also that the affidavit may be amended without being resworn to, and that either party may use any and all parts of the charter of said companies and amendments of the same before Judge Hopkins, and it is agreed to submit the question to him for decision at once without the intervention of a jury, subject to a review by either side by Supreme Court, upon legal arguments heretofore presented to the court, in other railroad cases, to-wit. C. R.R. & B'k'ng Co., and Ga. R.R. & B'k'ng Co., except the arguments upon the plea to jurisdiction, which arguments make part of the issue made in this case, and further arguments to be advanced by defendant.

N. J. HAMMOND, Attorney General.
LOVELL & FALLIGANT, Def't's Att'ys.

This made the case of the first fi. fa., No. 107.

The judgment of the Superior Court was in favor of the State, and the fi. fa. was ordered to proceed.

At the July Term, 1875, of the Supreme Court of Georgia, this judgment of the court below was affirmed. (For grounds of affirmance, see printed record, 15, 16, 17, 18, 19, 20, 21 and 22.)

The second fi. fa,, No. 772, was issued 3d of November, 1875, for the tax of that year due by the company, upon a return made by them under the law; and the same for $8,754.55 was duly levied.

The defendant filed thereto the following affidavit of illegality:

THE STATE OF GEORGIA vs. THE ATLANTIC AND GULF RAILROAD COMPANY. } Fi. fa. etc Chatham county, returnable to Fulton county.

And now comes the Atlantic and Gulf Railroad Company, the defendant in said fi. fa., and saith that the said fi. fa. has been levied on the building known as the machine shop, locomotive house, and car shop, situate, lying and being at the Atlantic and Gulf Railroad depot, in the city of Savannah, county of Chatham, and State of Georgia, (the property of the defendant,) and the said fi. fa. is proceeding illegally, because this defendant saith—

1st. That by the charter of incorporation of the Savannah, Albany and Gulf Railroad Company, granted December 25, 1847, itwas declared that the defendant was "invested with all the rights, privileges, and immunities which by the laws of Georgia are held and enjoyed by any other incorporated railroad company within this State;" that by the 18th section of the act of incorporation of the company now known

as the Central Railroad and Banking Company of Georgia, then the Central Railroad and Canal Company, approved December 14th, 1835, it was declared that the railroad and the appurtenances to the same shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income. And further, that by the act of incorporation of the Atlantic and Gulf Railroad Company should be entitled to all the privileges, immunities, and exemptions granted to the Central Railroad and Banking Company of Georgia, and the Georgia Railroad and Banking Company, or either of them, by the acts incorporating said two companies, and that one of the exemptions to said two companies was that said railroads and their appurtenances should not be taxed by the State of Georgia higher than one-half of one per centum upon their annual net income; and this deponent further says that, under the said charters of said two companies, the chartered stock of said the Savannah, Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Company was subscribed, paid up, and expended in the construction of said railroad and appurtenances, and in the purchase and erection of such depots, buildings, and other appurtenances as properly belong to the same; and that the said stockholders accepted said charters, and that the provisions of said charter have never been repealed, changed, with the consent of said stockholders or this defendant.

And this defendant says that by the act of the Legislature of the State of Georgia, passed the 18th day of April. 1863, the said the Atlantic and Gulf Railroad Company and the said the Savannah, Albany and Gulf Railroad Company were authorized to consolidate their stocks upon such terms as might be agreed upon by the directors of said railroad companies and ratified by a majority of the stockholders thereof; and that it was specially provided by said last act, that the several immunities, franchises, and privileges granted to the said the Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, shall continue in force; and further, that nothing in said act shall be so construed as to impair the covenants and obligations of the Atlantic and Gulf Railroad Companies to and with the State of Georgia. And this deponent further says, that the said two companies, relying on the pledge of the State that their rights, privileges, franchises, immunities, and exemptions should continue of force unimpaired, entered into arrangements with each other, by which the two roads should be worked together under the name of the Atlantic and Gulf Railroad Company, but have never surrendered to the State any of their chartered rights. And this deponent further says that all the property on which said taxes is assessed, and said tax fi. fa. issued, is the property in which the capital stock of the said the Savannah, Albany and Gulf Railroad Companies, and the said original, the Atlantic and Gulf Railroad Company is invested, and constitutes as well the stock as the railroad and appurtenances of said two companies, now known as the Atlantic and Gulf Railroad company, this defendant, and that the tax so assessed is a tax on its railroad and appurtenances, and that the tax so assessed is a tax which far exceeds a tax of one-half of one per centum on its annual net income.

And this deponent further says that it made no net income during the year 1874. This deponent further says that there is no valid law of the State of Georgia, under which the said tax was assessed and the said fi. fa. issued against this defendant, and that the act of the Legislature of the State of Georgia, approved on the 28th day of February, 1874, entitled "An act to amend the tax laws of this State so far as the

same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charter of such companies respectively as may conflict with the provisions of this act," is unconstitutional, null, and void, and of no legal effect, in this, that the said act attempts to repeal a material portion of the charter of this company and to impose upon the railroad and appurtenances of this defendant another and greater tax than one-half of one per centum per annum on the net income of this defendant, in which said action is in conflict with paragraph 1, section 10, article 1, of the Constitution of the United States, inasmuch as it is an act impairing the obligation of contract between the State of Georgia and the defendant and its stockholders.

And this defendant further says that this affidavit is not interposed for the purpose of delay, but *bona fide* in defence of the rights of this defendant against the levy of said tax fi. fa.

Personally appeared John Screven, President of the Atlantic and Gulf Railroad Company, the above named defendant, who being duly sworn, deposes and says, that the facts set forth in the foregoing and above affidavit are true.

JOHN SCREVEN,
President of the Atlantic and Gulf Railroad Company.

Subscribed and sworn to before me, this 4th day of January, 1876.

JOHN W. BURROUGHS,
N. Public, Chatham County, Ga.

Filed in office Sept. 1, 1876.

J. D. COLLINS, C. S. C.

Amendment to affidavit of illegality filed by counsel, Nov. 24, 1876:

And this defendant further says, that the 12th section of an act of the General Assembly of the State of Georgia, approved March 3d, 1875, and entitled "an act to levy a tax for the support of the Government for the year 1875, to amend an act entitled an act to amend the tax laws of the State, and for other purposes, approved February 28th, 1874, to provide for the collection of taxes due the State, and for other purposes, therein mentioned," is unconstitutional, null, and void, and of no legal effect, in this, that the said acts attempt to impose [upon] the railroad and appurtenances of this defendant another and greater tax than one half of one per centum per annum on the net income of this defendant, in which said act is in conflict with paragraph 1, section 10, article 1, of the Constitution of the United States, inasmuch as it is an act impairing the obligation of the contract between the State of Georgia and this defendant and its stockholders. And this defendant further says that the said tax act of 1875, in its 12th section, is unconstitutional, null, and void, because it is in violation of the Constitution of the State of Georgia, as contained

in sections 5,019 and 5,056 of the Revised Code of 1873.

And this defendant further says that it has made a return of its gross receipts, and has returned that it has no net income from May 1, 1874, to May 1, 1875, and that the Comptroller General has assessed no tax on income against this defendant for said period.

Filed in office Nov. 24, 1876.

J. D. COLLINS, C. S. C.

The following was the agreed statement of facts on the trial:

Upon the trial of the above cause the following facts are agreed upon by counsel for plaintiff and defendant, as the facts to be presented on the trial of the issues between the parties:

1. That the Savannah and Albany Railroad Company was incorporated by an act of the legislature of Georgia, on the 25th day of December, 1847, and that by the first section of said act of incorporation, the said railroad company was invested with all the rights, privileges and immunities which, by the laws of Georgia, were held and enjoyed by any incorporated railroad company or companies.—(See Pamphlet Laws of Georgia, 1847, p. 191.)

2. That the Atlantic and Gulf Railroad Company was incorporated by an act of the Legislature of Georgia, approved the 27th day of February, 1856, by the fourth section of which act it was declared that all the privileges, immunities and exemptions granted to the Central Railroad and Banking Company, and the Georgia Railroad and Banking Company, or either of them, by the acts incorporating said companies, and the several acts amendatory thereof, were granted to the Atlantic and Gulf Railroad Company.—(See Acts 1856, Pam., 160.)

3. That the said two railroad companies, under their respective acts of incorporation, constructed their several lines prior to 1860.

4. That on the 18th day of April, 1863, the Legislature of Georgia passed an act authorizing the consolidation of the stocks of the Savannah, Albany and Atlantic and Gulf Railroad Company, which was to be ratified by a majority of the stockholders of said two companies, and by the third section of which said act it was declared "that the several immunities, franchises and privileges granted to the Savannah, Albany and Gulf R. R. Co., and the Atlantic and Gulf Railroad Company by their original charters, and the amendments thereof, and the liabilities therein imposed, shall continue in force, except so far as they may be inconsistent with this act of consolidation.—(See Pamphlet Laws 1863, p. 223.)

5. That for years before, and at the time of the passage of the act of consolidation of said two companies in April, 1863, the State of Georgia was a stockholder in said original Atlantic and Gulf Railroad Company, to the extent of one million dollars, and that in June, 1863, the State of Georgia voted for said consolidation, casting therefor ten thousand votes, that being the number of shares then held by the State in said company; that on June 30, 1863, the terms of consolidation had been agreed upon by both companies.

It is further agreed that there are still outstanding, in the hands of *bona fide* holders, a large number of the bonds of the Savannah, Albany and Gulf Railroad Company, and of the Atlantic and Gulf Railroad Company, secured by morgtages on the property of the respective companies, issued before consolidation.

It is also agreed that the preface to the Code of Georgia, signed

by David Irwin, Thomas R. R. Cobb and R. H. Clark, and also the report of the committee on the part of the Senate and House of Representatives of Georgia, as contained on pages 3, 4, 5 and 6 of the Code, revised by Irwin, Lester and Hill, be admitted in evidence. It is also agreed that the body of laws, known as the Revised Code of Laws, prepared by Richard H. Clark, Thomas R. R. Cobb and David Irwin, was not read three times in each House on three separate days, as prescribed by the Constitution of Georgia, but was adopted by reference to a manuscript file in the executive department.

6. That the State of Georgia is still a stockholder, and has retained her original scrip in the Atlantic and Gulf Railroad Company. She has never surrendered her old scrip and has never taken any new scrip under the consolidation.

7. That there has been no act of the Legislature of Georgia since April, 1863, affecting said companies as consolidated.

8. That during the year 1874 the gross receipts of defendant amounted to $990,899 13, and the expenditures to $1,248,180.69, an itemized account of which is hereto attached, marked "exhibit A."

9. That defendant has never made or paid a dividend of any kind, and that neither of the said companies, before consolidation, have ever made or paid a dividend of any kind.

10. That the State of Georgia, up to the passage of said act of 1874, had never collected from said defendant any tax whatever, and that said companies have always claimed that they never have have made a net income.

11. That in perfecting the consolidation of the stocks of said companies there was no requirement that new scrip should be issued to the holders thereof. Each stockholder continued to hold his original scrip.

12. That said defendant has made returns under oath semi-annually to the Governor of the State, containing a full and accurate statement of the pecuniary affairs of the defendant.

13. That at the time of said consolidation, and before, both companies had the same president, treasurer and other officers, who continued after consolidation.

14. It is also agreed that the affidavit may be amended without being sworn to, so as to make it conform to the agreed state of facts, and that either party may use any parts of the charters, and amendments thereof, before any court before which this cause may be tried.

That defendant has made a return of its gross receipts, and has returned that it has no net income from 1st May, 1874, to 1st May, 1885, and that the Comptroller General has assessed no tax on income against the defendant for said period.

15. It is agreed to submit this cause to the adjudication of the judge or acting judge of the Superior Court of Fulton county, without the intervention of a jury, subject to review by the Supreme Court, Atlanta, Ga.

Nov. 22, 1871.

R. FALLIGANT,
HARTRIDGE & CHISHOLM,
Att'ys. A. & G. R. R. Co.
N. J. HAMMOND, Att'y. Gen'l.,
R. TOOMBS, for State.

16. It is further agreed that there are still outstanding in the

hands of *bona fide* holders a large number of the bonds of the Savannah, Albany and Gulf Railroad Company, and of the Atlantic and Gulf Railroad Company, secured by mortgages on the property of the respective companies, issued before consolidation. It is also agreed that the preface to the Code of Georgia, signed by David Irwin, Thomas R. R. Cobb, and R. H. Clark, and also the report of the committee on the part of the Senate and House of Representatives of Georgia, as contained on pages 3, 4, 5 and 6 of the Code revised by Irwin, Lester and Hill, be admitted as evidence. It is also agreed that the Code of Laws prepared by Richard H. Clark, Thomas R. R. Cobb and David Irwin, was not read three times in each House on three separate days, as prescribed by the Constitution of Georgia, but was adopted by reference to a manuscript on file in the executive department.

Filed in office Nov. 24, 1876.

J. D. COLLINS, C. S. C.

After hearing argument the judge of the Superior Court held that the affidavit of illegality was well taken, and sustained the same, and ordered that said fi. fa. go for naught.

This judgment was carried by writ of error to the Supreme Court of Georgia by the State, and at the January term, 1878, a decision was rendered reversing the judgment of the court below.

The ground of that reversal appears from the following opinion pronounced in the case:

THE STATE OF GEORGIA
vs.
THE ATLANTIC AND GULF RAILROAD COMPANY.

By the Court:

1. The Savannah and Albany Railroad Company and the Atlantic and Gulf Railroad Company having been chartered prior to the adoption of the Code—the former in 1847, for thirty years only, the latter in 1856, without limit as to duration—and the consolidation of the two upon such terms and conditions as might be agreed upon by their directors, and ratified by a majority of their stockholders, having been authorized by an act of the general assembly, passed in 1863 (after the Code went into effect), which act declared that "the said railroad companies, when so consolidated, shall be known as 'The Atlantic and Gulf Railroad Company;' that nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into by either, but this company shall be liable on the same; that the stockholders of said consolidated railroad companies, by such corporate name, and in such corporate capacity, are made capable in law to have, purchase, and enjoy such real and personal estate, goods, and effects as may be necessary and proper to carry out the objects herein specified, and to secure the full enjoyment of all the rights herein and hereby granted, and by said name to sue and be sued, and plead and be impleaded, in any court of competent jurisdiction, to have and use a common seal, and the same to alter at pleasure, and to make, ordain, and establish such rules, by-laws, and regu-

lations as shall seem necessary and convenient for the government and protection of said corporation, the same not being contrary to the constitution and laws of this state, and generally to do and perform and execute all such acts, matters, and things as may pertain to corporations of like character; and that the several immunities, franchises and privileges, granted to the said Savannah, Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Company by their original *character* and the amendments thereof, and the liabilities therein imposed shall continue inforce, except so far as they may be inconsistent with this act of consolidation."

Held, That when the consolidation took place in pursuance of the act of 1863, a new corporate being came into existence, and whatever of the property of the former companies passed to it, as well as whatever property it subsequently acquired, became subject to the general taxing power of the legislature, irrespective of any concession or limit of the power which the charters of the former companies contained, there being in the new charter no express negative upon the right of the state to "withdraw the franchise" or to "change, modify, or destroy" the corporation. (Code, sections 1682, 1651.)

2. The case of The Central Railroad and Banking Company vs. The State, 54 Ga., 401, until adjudged to be erroneous, was sufficient to rule the present case; but since the reversal of the judgment in that case by the Supreme Court of the United States, a closer comparison of the legislation involved in the two cases becomes important; and, on such corparison, it is apparent that the legislative purpose to create a new comparison is not, in this instance, doubtful; whereas, in the former, as determined by the court of last resort (2 Otto, 143,) the purpose did not exist.

Judgment reversed.

The following are the acts of the Legislature of Georgia providing for the union and consolidation of the Macon and Western Railroad with the Central Railroad and Banking Company, and also the consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company:

An act to authorize and provide for the union and consolidation of the Macon and Western . ailroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company, and for other purposes therein named. Approved August 24th, 1872.

Section 1. Be it enacted by the General Assembly of the State of Georgia, That the Macon and Western Railroad Company and the Central Railroad and Banking Company of Georgia be, and they are hereby, authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies under the name and charter of the said the Central Railroad and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated companies: Provided, That nothing therein contained shall relieve or discharge either of said companies from any contract heretofore entered into, but that all such contracts shall be assumed by, and be binding on, the Central Railroad and Banking Company of Georgia, and all benefits and rights under the

same shall accrue to and vest in the said last mentioned company: And provided further, That, upon such union and consolidation, the capital stock of the Central Railroad and Banking Company of Georgia shall not exceed the amount of the authorized capital thereof and the present authorized capital of the Macon and Western Railroad Company added thereto.

Sec. 2. Be it further enacted, That such union and consolidation as is herein provided for shall not take place until at least two-thirds of the stockholders of each of said railroad companies (estimated by the number of shares held by each) shall have assented thereto, either in a stockholders' meeting, called for that purpose by said companies respectively, or by written authority to the directors by the stockholders, representing at least two-thirds of the stock of each of said companies.

Sec. 3. Be it further enacted, That when it shall be ascertained, in the manner herein provided, that at least two-thirds of the stockholders of each of said companies have assented to such union and consolidation, it shall be the duty of the board of directors of each of said companies, respectively, to complete said union and consolidation, and to certify the same under the corporate seals of said companies, respectively, to his Excellency, the Governor of this State, to be filed in the office of the Secretary of the State.

Sec. 4. Be it further enacted, That, upon the union and consolidation herein provided for, each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a shareholder in the Central Railroad and Banking Company of Georgia, for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the same rights, privileges and benefits as attach to the holder of stock now held by the shareholders in said companies, or either of them.

Sec 5. Repeals conflicting laws.—Acts of 1872, pp 27-28.

An act to authorize and provide for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company.

Section 1. Be it enacted, etc., That upon a vote of a majority of two-thirds of the stockholders, in amount, in the aforesaid companies, respectively, in favor of the union and consolidation of the Muscogee Railroad Company, its franchises and property, with the said Southwestern Railroad Company, under the charter of the last mentioned company, on such terms as the said companies may respectively agree, it shall be lawful so to unite and consolidate the said two companies into one, under the charter of the Muscogee Railroad Company.

Sec. 2. And be it further enacted, That upon such union and consolidation the capital stock of the Southwestern Railroad Company shall not exceed the amount of the present authorized capital thereof, and the present authorized capital of the Muscogee Railroad Company.

Sec. 3. And be it further enacted, That upon such union and consolidation, as hereinbefore provided for, the holders of stocks in the Muscogee Railroad Company shall surrender their certificates of stock to the Southwestern Railroad Company, and receive in lieu thereof certificates of stock in the Southwestern Railroad Company, to such an extent and amount as the said two companies may agree on; and thenceforward all the rights, privileges

and property of the said Muscogee Railroad Company shall be part and parcel of the said Southwestern Railroad Company, and all the chartered rights and privileges of the Southwestern Railroad Company be extended over the track and line of the Muscogee Railroad Compaey, and everything appertaining thereto; the name and style of the consolidated company shall be and continue "The Southwestern Railroad Company."

Sec. 4. And be it further enacted, That upon the union and consolidation of said companies, all the debts and liabilities of the Muscogee Railroad Company shall be assumed and paid by the Southwestern Railroad Company.

Sec. 5. And be it further enacted, That this act shall go into operation when, and not until, there shall be a vote of a majority of two-thirds of the stockholders, in amount of stock of each of said companies, in favor of this union and consolidation, and of the provisions of this act, certified under the corporate seals of said companies respectively, to his Excellency, the Governor of this State.

Sec. 5. And be it further enacted, That if, from any cause, the union and consolidation of the said companies hereinbefore provided for shall not take effect, then it is hereby declared that nothing herein contained shall affect, alter or change in any way the present existing rights of said companies respectively.

Approved March 4, 1856.—Ib. pp. 14-15.

The act incorporating the South Georgia and Florida Railroad was as follows:

An act to incorporate the South Georgia and Florida Railroad Company.

Whereas, by an agreement entered into between the Directors of the Georgia and Florida Railroad Company, and parties resident in Thomas county, named in the charter, the said parties in Thomas county were to have the control of the charter of said company for all of said line of road south of Albany, and legislative provision was to be obtained therefor, and under said agreement a Provisional Board of Directors has been elected for said road, south of Albany:

11. Section I. Be it enacted, That from and after the passage of this act, Thomas B. Winn, D. S. Brandon, James L. Seward, A. H. Hansell, William McLendon, P. E. Love, James H. Hayes, and their associates, successors and assigns, be, and they are hereby, declared and constituted a body corporate and politic, by the name and style of the South Georgia and Florida Railroad Company, and by that name may sue and be sued, plead and be impleaded, in any court of law or equity in this State, may have and use a common seal, and the same alter or destroy at pleasure, and may purchase, accept, have, hold, enjoy

and convey any property, real, personal or mixed, which may be necessary or proper for the purposes herein mentioend.

12. Sec. II. Be it further enacted by the authority of the same, That said company shall have power and authority to survey, lay out and construct, equip, use and enjoy a Railroad from Albany, in the county of Dougherty, or any point in its vicinity, on either side of Flint River, to Thomasville, in the county of Thomas, and from Thomasville to any point on the Florida line, and to connect with any other road at such points as they may deem best.

13. Sec. III. Be it further enacted by the authority aforesaid, That the capital stock of said company shall be not less than fifty thousand, or more than one million of dollars, books of subscription for which shall be opened at such times and places as a majority of the parties named, their successors or assigns, shall determine.

14. Sec. IV. Be it further enacted by the authority aforesaid, That the provisions of the act incorporating the Georgia and Florida Railroad Company, so far as applicable, shall be applied to said South Georgia and Florida Railroad Company.

15. Sec. V. Be it further enacted, That the road contemplated in this act shall be commenced with five years from the passage of this act, or this charter be forfeited.

16. Sec. VI. (Repeals conflicting laws.)

Assented to December 22d, 1857.

The act of 1852, incorporating the Georgia and Florida Railroad was as follows:

An Act to incorporate the Georgia and Florida Railroad Company, and to confer certain powers and privileges therein mentioned. Approved, January 22, 1852.

126. SECTION I. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authoritiy of the same, That Joseph Bond, P. M. Nightingale, James M. Mercar, N. W. Collier, W. W. Cheever, Benjamin Jourdan, David A. Vason, Nelson Tift, Michael Young, Thomas Jones, Elijah R. Young, Thomas B. Wynn, M. B. Jones, W. G. Ponder, Hardy Bryan, James L. Seward, and their associates, or a majority of them, and assigns, are hereby constituted a body politic and corporate, under the name of the Georgia and Florida Railroad Company, and under said corporate name, they, or a majority of them, shall have authority to construct a Railroad from Oglethorpe, or some other point on the Southwestern Railroad, to Albany, in Baker county; and they shall also have authority to construct a Railroad from Albany to Thomasville, in Thomas county, aud from thence to the Florida line, in

the direction of Tallahassee. And the said Company are also authorized to construct a Plank Road, or a graded or a Macadamized Road, in connection with, or in lieu of their Railroad. And for the purpose of constructing said Road or Roads, procuring the right of way, and managing all the affairs of said Company, they are hereby invested with the same powers and privileges which have been granted to the Savannah and Albany Railroad Company by its original Charter, and the Acts amendatory thereof, which are not inconsistent with the rights and privileges which have been granted to the Savannah and Albany Railroad Company.

127. SEC. II. And be it further enacted, That the Georgia and Florida Railroad Company may at any time incorporate their Stock with the Stock of any other Company, on such terms as may be mutually agreed upon by such Companies; Provided, That the Road and other property of this Company shall be subject to such taxation as the Legislature may deem equitable and just.

128. SEC. III. Be it further enacted, That the said Georgia and Florida Railroad Company, shall have authority to make all such by-laws, rules and regulations, for managing the affairs of said Company, as they shall deem proper, not inconsistent with the Constitution of this State or the United States; and may by said by-laws, from time to time, determine the amount of Stock necessary to carry out the purposes of said Company, and the construction of said Road or Roads.

ARGUMENT FOR THE STATE.

Has plaintiff in error lost the privilege of being taxed at a limited rate by the consolidating act of 1863?

The word consolidation seems to be used in two senses in this country. In Fields on Cor., section 426, it is said that "The term consolidation in this country is generally used in the place of amalgamation in England. It is sometimes an organization or constitution of a new company out of two or more old ones, or a conveyance of the capital and rights of one or more to another, the latter continuing the business of all in its original corporate name, under stipulated arrangements, and in accordance with statutory provisions relating to the subject." The same idea is advanced by the Supreme Court in Central Railroad and Banking Company *vs.* Georgia, 92 U. S. R., 665, making the former a case when the consolidation is full and complete, and the latter when it is only partial and limited. The case just mentioned, as well as that of the Southwestern Railroad, decided at the same time, are instances of the latter kind; while Philadelphia, Wilmington and Baltimore Railroad *vs.* Maryland, 10 How., and Shields *vs.* Ohio, 95 U. S., 319, are examples of the former kind. Many others might be given. The distinction is important, for very different results follow, so far as the old companies are concerned, as we adopt one or the other of these definitions, or as one or the other of these states of facts exist. If there be "an organization or constitution of a new company," or, to express the same thought, if the consolidation be full and complete, it must necessarily work a dissolution of the old companies. To illustrate: If the Atlantic and Gulf Railroad Company be a corporation created by, deriving its existence from, the act of 1863, it must have the full and exclusive right to control all of the lines of road owned by the two companies prior to the union. This would negative the rights which either of the old companies had in the separate lines of road. Two bodies cannot occupy the same space at the same time. But if the consolidation be only partial, the same result of dissolution is still effected, but not to the same extent; the one company is enlarged so as to receive the other, which is thereby ab-

sorbed and extinguished. So that in every case of consolidation this result of total or partial extinction of one or both of the old companies must follow. But if there be no destruction of either of the original companies, there can be no consolidation. On this principle it has been held in England that "A railway company associating, allying and connecting itself with another, does not thereby become equitably amalgamated with it," etc. (The Shrewsbury, etc., Railway Company *vs.* The Stour Valley Railway Company, 21 Eng. L. E. R., 628.) So the acts of the Legislature of Georgia, authorizing the Central Railroad and Banking Company to lease and work certain connecting roads, would not amount to a consolidation according to either definition of that term. (Acts of 1851-52, page 119.)

In the note to Green's Brice's, *ultra vires*, 538, a somewhat different definition is given of this term; in this that "consolidation would, *e. g.*, be inapplicable to a union of two or more companies, in such a way that one of the original corporations only was continued in existence, while the others were merged and absorbed in it. This principle is announced upon the authority of Powell *vs.* Northern Missouri Railroad Company, 42, Mo. 63, which is cited by the author, and on page 539 he draws this conclusion, that "in the American view, therefore, it would seem that the dissolution of all the old corporations, and the creation of one new one, are essential to consolidation."

But so long as the principle is kept clearly in view which distinguishes these two classes of corporations, the terms by which they are defined are of minor importance. Still as the word consolidation is sometimes used in statutes where the union is only partial, *e. g.*, in the case of the Central Railroad and Banking Company *vs.* Georgia, 92, U. S. R., 665, doubtless the former definition is more accurate, and is preferable. On this idea it would follow, as stated in that case, that "the consolidation of two companies does not necessarily work a dissolution of both and the creation of a new corporation—whether such be its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place."

In the cases now before the court, the first question is, what was the legislative intent manifested in the act of 1863? to create a new corporation, or to enlarge one of the old ones, so as to carry out the purposes of the act? This must be answered by reference to the act itself. From this

it will appear (1) that the words used are those ordinarily employed in creating corporations. The second section would have no meaning whatever unless intended to create a new corporation. It clothes the stockholders of the consolidated companies with full power and authority to do those things that corporations usually do. The act does not continue either of the old corporations; it makes one, then and there, to carry out the purposes of the act.

2. By comparing this second section of the act of 1863, with the first section of the act of 1856, incorporating the old Atlantic and Gulf Railroad Company, it will be seen that the former must have been copied from the latter. If these words in the act of 1856 were used to incorporate the old Atlantic and Gulf Railroad Company, for what other purpose could the same words have been used in the act of 1863, than to incorporate the new Atlantic and Gulf Railroad Company? If they made a corporation in the first instance, they must equally have made one in the second.

The grant of corporate powers is broader in the act of 1863 than is given by the first section of the act incorporating the Savannah and Albany Railroad Company. There is, therefore, at least as good ground to maintain that a new corporation was made by the act of 1863, as that either of the original companies ever had an existence.

3. The words "new" and "old," when used with reference to these corporations, are merely relative. It certainly is not necessary to characterize a corporation when first created as *new;* from the nature of things it becomes so, just as an infant when born is a new being. If the word *old* were inserted before the names of the original companies, and the word *new* before the name of the company created by the act of 1863, every one would see at a glance the legislative intention, but those words could be inserted respectively not only without doing violence to the act, but in consistency with all of its provisions.

4. This court in the Liverpool Insurance Company *vs.* Massachusetts, 10 Wall, 566, held that,

"2. A joint stock association which by its deed of settlement in England and certain acts of Parliament, is endowed with the faculties and powers mentioned below, is a corporation, and will be so held in this country, notwithstanding the acts of Parliament in accordance with a local policy declare that it shall not be so held. These faculties and powers are:

1. A distinctive artificial name by which it can make contracts.

2. A statutory authority to sue and be sued in the name of the officers, as representing the Association.

3. A statutory recognition of the Association as an entity distinct from its members, by allowing them to sue it, and be sued by it.

4. A provision for its perpetuity by transfer of its shares so as to secure a succession of membership."

Section 2 of the act of 1863, after enumerating specifically the rights and powers to be exercised by this corporation, adds, "and generally to do and perform, and execute all such acts, matters and things, as may appertain to corporations of like character."

5. It must have been the purpose of the act of 1863 either to extinguish both of the original companies and form a new one, or else to enlarge one of them so it could absorb the other. But if the latter was the purpose, the act does not indicate which was to be enlarged and retained and which absorbed, and hence we must suppose that the intention was to extinguish both and create a new corporation to take their place. In Shields *vs.* Ohio, 95 United States Reports, 322, the Court say: "The Legislature had provided for the consolidation. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not co-exist."

6. The second section of the act of 1863 creates a corporation when it provides, "That the Stockholders of said consolidated railroad companies, by such corporate name and in such corporate capacity, are made capable in law to have, purchase," etc.

In State *vs.* Maine Central, 66 Me., 506, the Court say: "Nor can it be said that the act under which the defendant corporation has organized is not an act of incorporation. It is an act of incorporation. If the stockholders of the respective corporations had been incorporated, it would have been one. It is none the less so by the incorporation into a new corporate body of previously existing corporations."

"There is no particular form of words requsite to create a corporation," says Chancellor Kent in Denton *vs.* Jackson, 2

Johns, (N. Y.), ch. 324. "A grant to hold mercantile meetings bas been held to confer corporate capacity"—6 Viners, Ab. 260.

Anciently, if the King had granted to a *vill guildam mercatoran*, it was by such grant incorporated—4 Comyns Dig—top page 470—2d Kents Com. 307.

A corporation" as defined by the laws of Georgia, is an artificial person created by law for specific purposes, the limit of whose existence, powers and liabilities is fixed by the act of incorporation usually called its charter. Code, §1670.

There is no principle announced by the Supreme Court of the United States, in the two Tax cases reviewed by that court, which conflicts with the position now assumed on behalf of the State; on the contrary, those cases, when closely analyzed, are believed to sustain the position that the act of 1863 did clearly create a new corporation by working a dissolution of the original companies.

In the Central Railroad *vs.* Georgia, 92 U. S. R., 670, the court say that the question was, "Did the act contemplate a surrender of its charter by the Central Railroad and Banking Company, and the grant to it of a new charter, or a re-grant of the old? It must be obvious that the general question is the same here, with this difference, that it is the act of April 18th, 1863, that is now to be construed, instead of that of August 24th, 1872. And as the court said in reference to the latter act that they would look to its provisions, in order to determine whether the intention of the Legislature as therein manifested was to work a dissolution of the Macon and Western and Central Roads, and the formation of a new corporation; so now the court will examine the act authorizing a consolidation of the stocks of the Savannah, Albany and Gulf, and the Atlantic and Gulf Railroads to ascertain whether the Legislative purpose was to dissolve the old corporations and call into existence a new corporate being.

One reason or argument by the court in opposition to the position of Counsel for the State in the Central Railroad case, was that the act of 1872 contained no words of grant of corporate powers. But section 2d of the act of 1863, does contain words of broad grant of corporate powers.

The common law incidents of corporations are perpetual

succession, the right to sue and be sued; to plead and be impleaded; to grant and receive property; to purchase lands, to have a common seal, and to make by-laws for the regulation and government of the affairs of the corporation. (Fields on Corp., Section 27.) All of these powers are expressly conferred by the Act of April 18th, 1863, excepting that of perpetual succession, which was not then, according to the law of Georgia, one of the incidental powers of a corporation. "Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant." (Code of 1863, Section 1678.)

The second reason given by the Supreme Court of the United States why the consolidation in the Central Railroad case did not work a dissolution of both companies was this:

"It (the consolidation) is to be done under *the name and charter* of the Central Railroad and Banking Company; that is, the union is to be under *that charter, not under a new charter bearing that name.*"

There is nothing in the Act of 1863 to indicate that the consolidation was to be effected under the charters of either the Atlantic and Gulf Railroad, or the Savannah, Albany and Gulf Railroad. All that can be said is that the consolidated company was required by the Act to take the name of one of the old companies, to-wit: The Atlantic and Gulf Railroad Company. If the union was not to be under either of those charters, the conclusion seems irresistible that it was to be under a new charter granted at that time.

The fact that the new corporation contained the name of one of the original company was a mere matter of taste and convenience, and could not affect the question whether the purpose of the act of 1863 was to create a new corporation.

In Wyman *vs.* Hallowell and Augusta Bank, 14 Mass., 57, it was held that "a banking company being incorported by the same name with a former one, and having appointed the same president and cashier, received and issued the notes of the former company, the officers of the new company frequently declaring that there was no difference between those notes and those issued by the new company, it was holden that the new company was not thereby liable

for the notes of the former company." On page 61, Parker, C.J., says: "The two banks, which have the same name, are necessarily two distinct corporate persons, both having legal existence together, but neither being answerable for the notes, promises or obligations of the other. They unfortunately had the same persons for president and cashier—a circumstance which has caused much confusion and no little mischief."

In Philadelphia and Wilmington Railroad Company *vs.* Maryland, 10 How., 377, the facts were, as taken from the record, that "the Philadelphia, Wilmington and Baltimore Railroad Company was formed by an agreement of union, duly made and entered into between the following corporations, to-wit: the Baltimore and Port Deposit Railroad Company, the Wilmington and Susquehana Railroad Company, and the Philadelphia, Wilmington and Baltimore Railroad Company, of Pennsylvania." (Delaware Railroad Tax Cases, 18 Wal., 206.)

In Shields *vs.* Ohio, 95 U. S. R., it is stated on page 322 that "On the 11th of February, 1869, by an agreement of that date, the Cleveland and Toledo and the Lake Shore Railroad Company became consolidated under the name of the Lake Shore Railway Company."

In State *vs.* Maine Central, 66 Me., 492, it appears from the record that three separate railroads "were consolidated with the Maine Central Railroad Company into one corporation, thus forming a new corporation, which retained the name of the Maine Central Railroad Company."

3. The court go on to say that "The union is also to be in such a manner that every holder of the shares of the capital stock of the Macon and Western Railroad Company shall be entitled to, and shall, on the surrender of their certificates, receive an equal number of shares of the capital stock as a share-holder in the Central Railroad and Banking Company of Georgia, as declared in the 4th section."

There is no provision similar to this in the act of 1863; nothing to indicate that either railroad was to be regarded as the basis on which the union was to be made. Indeed, the act is silent on the question of a surrender of shares of capital stock by either road. That was sufficiently provided for in the 1st section of said act authorizing the "Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, to consolidate their stocks upon such terms and conditions as may be agreed upon by the

directors of said railroad companies, and ratified by a majority of the stockholders thereof."

It was a matter purely of agreement between the respective directors and stockholders of the two companies, whether each share in the old companies should represent in value the same amount in the new company, or more, or less; and also how the fact of ownership of stock in the new company should be evidenced, whether by surrendering the old and taking new stock, or by letting the old shares remain to represent the interest which each shareholder had in the consolidated company. The above quoted provision is broad enough to authorize any course that might be pursued.

4. The Court further say: "Again: the act declared that all contracts of either of the companies should be assumed by, and binding on the Central Railroad and Banking Company," etc. The language of the proviso of the first section of the act of 1863 is "that nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into by either, but this compa ny shall be liable on the same;" evidently meaning by the words "this company," the company now incorporated.

The conclusion sought to be reached is, that the act of 1863 effected a total consolidation of the two original companies, by working a dissolution of them, and creating a new corporation under the name of the Atlantic and Gulf Railroad Company.

Indeed, counsel for the plaintiff in error do not seem to contest seriously the position here assumed, that the object of that act was to create a distinct corporation from either of the original companies. It is true that it is claimed by them that "consolidation does not imply the surrender of all privileges, immunities and franchises, and a re grant of them;" but this is rather a denial of the consequences which result from this full and complete consolidation, than of the fact itself.

And this brings us to the second question involved in these cases. If plaintiff in error derived corporate existence solely by the act of 1863, what right was acquired thereby to a limited rate of taxation?

It may be doubted whether the Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company had any valid claim to a limited rate of taxation by their original charters. It is certain that one of

them did not have this exemption to the extent claimed. By the first section of the act of 1847, the first named company was invested "with all the rights, privileges and immunities which by the laws of Georgia, were held and enjoyed by *any* incorporated railroad company or companies."

The rates by which the various railroads in this State were to be taxed were not uniform. In the Georgia Railroad and Banking Company it was the stock which was forbidden to be taxed, excepting at a certain rate; in the Central Railroad and Banking Company this rate applied to the railroad and appurtenances. In these two roads the tax was imposed upon the net income, but in the Savannah and Augusta Railroad, it was upon the annual income. The Rome Railroad was subject to be taxed only at the rate that bank stock was taxed at the date of its charter. (Rome Railroad Company *vs.* The Mayor and Council of Rome, 14 *Ga.*, 275). All of these companies were in existence when the act of 1847 was passed. How could the State possibly know how the Savannah, Albany and Gulf Railroad was to be taxed? The contract was not explicit in its terms. In Perine *vs.* Chesapeake and Delaware Canal Company, 9 How., 192, C. J. Taney says: "We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. But if upon such an examination, there is doubt or ambiguity in its terms, and the power claimed is not clearly given, it cannot be exercised." In State *vs.* Maine Central, 66 Me., 496, it is said—"But while, as has been seen, the State by contract and for a consideration may exempt specific property from taxation, or may limit its amount, the law under which such exemptions are claimed must be clear and explicit in its terms, leaving nothing to doubt or inference." See also St. Louis *vs.* The Boatman Insurance and Trust Company, 47 Mo., 150.

The same objection applies to the charter of the Atlantic and Gulf Railroad Company, passed in 1856, though not to the same extent; by the 4th section it was given all the privileges, immunities and exemptions granted to the Central Railroad and Banking Company, and the Georgia Railroad Company, or either of them. The objection to the validity of this provision is, that it does not fix a certain determiate rate by which the company is to be taxed. But if this is not correct, certainly the road is subject to be taxed

on the branch of the road from Dupont to the Florida line, and on that portion of the road called the South Georgia and Florida Railroad, from Albany to Thomasville, a distance of about sixty miles.

The map hereto appended will give a general idea of the location of the original roads and the branches constructed.

If it be conceded that these two companies, when operating their several lines of road, had a valid claim to a limited rate of taxation, which could not be repealed without their consent, yet, by accepting the consolidating act of 1863, they became liable to all the laws then in force relating to the charters of corporations. The Code went into operation the 1st of January, 1863. The plaintiff in error was incorporated the 18th of April, 1863. It embraced two provisions on this subject: one a declaration that corporations are, "except so far as the law *forbids* it, subject to be changed, modified or destoyed, at the will of their creator"; the other, that, "in all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

This point was raised in The Central Railroad, etc., vs. Ga., 92 U. S. R.; and on page 669 the court say:

"If it could be admitted, as contended by the State, that the charter granted in 1835 is no longer in existence, if, in fact and in law, it was surrendered in 1872, and 'if the Central Railroad and Banking Company of Georgia' is a new corporation, created when it united with the Macon and Western Railroad Company, the consequences claimed by the State might, and probably would, follow. The Code of Georgia, which went into operation January 1, 1863, has the following provisions:"

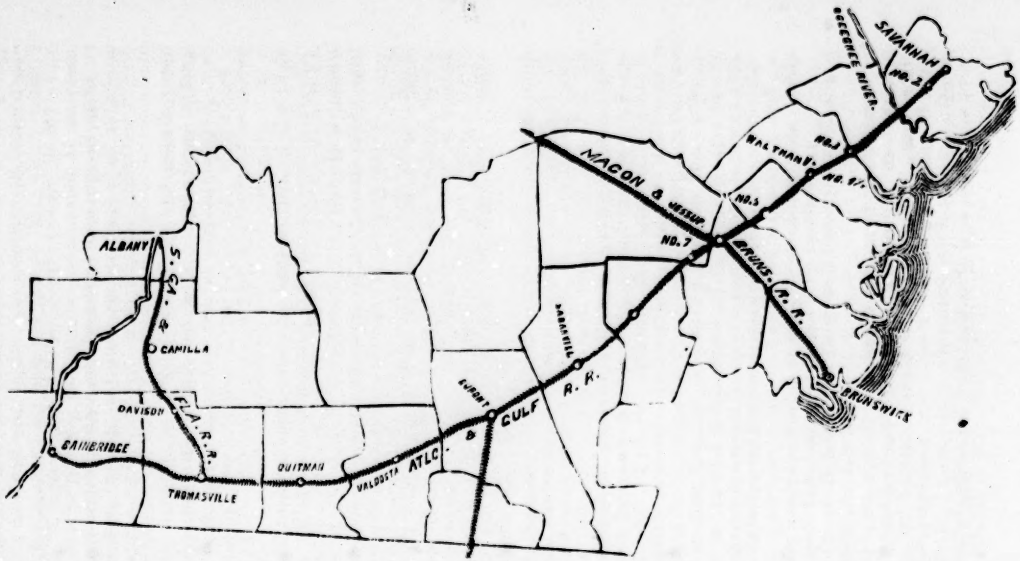
SEC. 1682. *In all cases of private corporations charters hereafter granted, the State reserves the right of withdrawing the franchise unless such right is expressly negatived in the charter.*

SEC. 1683. *Private corporations heretofore created, without the reservation of the right of disolution, and when individual rights have become vested, are not subject to dissolution at the will of the State.*"

"Chartered rights granted subsequent to the Code may therefore be withdrawn. It is equally certain that those granted before January 1, 1863, cannot be impaired by any subsequent legislative act."

The case then before the court did not require a decision on this question, and therefore it was stated only what would probably be the result; but in Shields vs. Ohio, 95 U. S. R., the precise question was involved, and on page 324 the court declares that—

"The constitutional provision that 'no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly,' entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred, subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was there-


SAVANNAH
No. 2
OGEECHEE RIVER
No. 3
WAL THAM
No. 4
No. 5
MACON & BRUNS.
No. 7
BRUNS. R. R.
BRUNSWICK
ALBANY
S. W. R. R.
CAMILLA
DAVISON
FLA. R. R.
BAINBRIDGE
THOMASVILLE
QUITMAN
VALDOSTA
ATLC.
EUFAULA
GULF
R. R.
BARNESVILLE

fore valid. Parker vs. The Metropolitan Railroad Co., 109 Mass., 506."

Again, in Railroad Co. vs. Maine, 96 U. S. R., 510, Justice Fields, delivering the opinion of the court, says:

"When this new company came into existence, it became subject to the provisions of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter be liable to be amended, or repealed, at the pleasure of the Legislature, in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary."

These authorities must be taken as settling the question, that when a charter is granted with a general law of the State, in force at the time, to the effect that the charter may be changed, modified or repealed at the pleasure of the Legislature, that a higher or different rate of taxation may be imposed without violating the contract.

But it is said that the right given by Section 1682, of the Code of Georgia to withdraw the franchise, does not necessarily give the Legislature authority to repeal the limited exemption from taxation enjoyed by the plaintiff in error—that the right to withdraw the franchise may very well exist without the corresponding right to alter, amend or change the privileges of the corporation.

This question came before the Supreme Court of Georgia at the July term, 1873, in the case of West End etc. Company *vs.* Atlanta etc. Company, 49 Ga. R. Two charters had been granted by the Legislature to construct street railroads in the City of Atlanta. The first granted in 1866, claimed certain exclusive privileges. In a suit growing out of this claim, on page 158, Warner C. J. delivering the opinion of the Court, said:

"When the company" (the former) "accepted the grant made by the General Assembly, it did so with a full knowledge of this general law, as much so as if it had been inserted in the act incorporating the company, and it is a well established rule that the laws which exist at the time and place of making of a contract enter into and form a part of it. The complainant's company, therefore, accepted the charter subject to the right of the State to withdraw, modify or restrict the franchise granted to it whenever the State should think proper to do so. The power to withdraw the entire franchise granted necessarily includes the power to modify it, or to restrict the exercise of it, and the question is, whether the General Assembly, by the passage of the act of 1872, has modified or restricted the complainant's franchise, as claimed under the act of 1866, even if it was *exclusive* to construct and use street railroads in *all* the streets of the city of Atlanta for thirty years?" They held it had so modified it by implication.

West End Street Railroad Company *vs.* Atlanta Street Railroad Company. 49th Ga. Rep., 158.

This section of the code was again construed in the case of the Central Railroad and Banking Company vs. the State of Georgia, 54 Ga. R., and the result as stated by McCay J., concurring on page 420, is as follows:

But it is said that whilst it may well be, that the charter is repealable, it does not at all follow that it is competent to take away a part of it.

The right to destroy may exist, and yet the Legislature has not a right to maim. But does not the right to repeal include the right to modify? Does not the greater include the less? Perhaps there might be strength in this position, if charters in this State stood as they do at common law. If it were competent for the State to compel a corporation to exercise its functions, perhaps it might well be said that the State could not take away a part, and insist on the corporation exercising what remains. But our Code—section 1685—authorizes a corporation to surrender its franchises. It was argued that the decision in the case of the Mechanic's Bank vs. Hurd, 37th Georgia, 401, is contrary to this. But that charter was one granted before the Code, and was irrepealable. This court has hot held that a corporation, created since the Code, may not surrender its franchises without the consent of the State. Indeed, such a right would seem to follow from the reservation of the right to repeal. A contract ought to be equal, and it was doubtless just because the right to repeal was reserved that the section authorizing a surrender was made a part of the system. If, then, the Legislature has a right to withdraw the whole franchise, it is within its sphere to withdraw a part. If the stockholders do not desire to keep what is left, they can surrender. But at best this objection is only a formal one. If the right to repeal exists, the Legislature may clearly, at its pleasure, enact that the charter shall be repealed, unless the corporation consent to pay taxes like other people; and practically this would, without doubt, be the consequence were this case to turn solely on the point that this is not a repeal, but only a modification.

But there is another section of the Code which is pertinent to this discussion. Section 1651 of the Code is as follows:

"Persons are either real or artificial. The latter are the creatures of the law, and except so far as the law *forbids* it, subject to be changed, modified or destroyed."

Now here is a clear declaration of the right to modify, change or destroy, unless the law forbids it. Evidently the codifiers had the very provisions found in section 1682 and 1683, in mind, as to private charters granted before the Code, the law—to-wit: The Constitution of the United States *forbids* the repeal or modification. As to the private charters granted since the Code the Legislature might forbid it, by so expressly contracting in the charter. Both these provisions ought to be taken together. They were the product of one mind, at the same time, and by taking them together, it seems to me that the law makers most surely used the word "withdraw," in section 1682, with the idea that it included the right expressly declared in section 1651, to change and modify as well as destroy.

The Supreme Court of Georgia were of the opinion that the act of 1872, authorizing the union and consolidation of the Central Railroad and Banking Company, and of the Macon and Western Railroad Company, made a new corporation, which became subject to the operation of the code; the Supreme Court of the United States held that the act did not make a new corporation, but, at the same time, admitted that if it had the consequences claimed by the State, might and probably would follow.

The Court in that case were not fully prepared to give their assent to the doctrine, "that consolidation is the creation of a new company;" but in later cases, have fully recognized it as we have seen *ante*.

In The City of Atlanta vs. Grant, Alexander & Co., 57 Ga. R., 346, Bleckley, J., delivering the opinion of the court, says: "The franchise to be a corporation is what constitutes an artificial person." Counsel

for the plaintiffs in error admit that this may be withdrawn by the Legislature under section 1682 of the Code. But if this were done, all the rights, privileges and immunities of the corporation, including the exemption from taxation, would be destroyed. Why adopt a construction which would force this circuitous mode of proceeding? If any of the chartered privileges of corporations are withdrawn so as to render the franchises less desirable or valueless, they have the corresponding right of surrendering these franchises.

The case cited by counsel, The Attorney General vs. The Railroad Co., 35 Wis., 425, does not, when closely examined, necessarily militate against this view. The 31st head-note lays down the principle that the power to resume the rights and privileges granted by the charter, in case of any violations of its provisions, would not imply the authority to limit the tolls in the absence of any judicial determination that the provisions of the charter had been violated.

But when it is considered that this section provides for the withdrawal of the franchise, and a former section of the Code declares that corporations are subject to be changed, modified or destroyed at the will of their creator, it cannot be doubted that it was the purpose of the Legislature in adopting these two provisions to place all the privileges and immunities of these artificial persons within their control.

In the decision of the last one of these cases before the Supreme Court of the State, Bleckly, Judge, cites both of those sections, as conferring upon the Legislature this power of repeal.

Indeed, counsel for plaintiffs in error seem to have overlooked the fact that there is such a provision as section 1651; and that this fully supplies whatever may have been considered as lacking in section 1682 to give the Legislature full power over the privileges of corporations.

It is contended by the plaintiffs in error that, admitting that this corporation is within the provisions of section 1682 of the Code, that still the tax imposed by the act of 1874 is illegal, because it was clearly the intention of the Legislature of 1863 to repeal that section so far as the right of the State might exist thereunder to thereafter impose a higher tax than one-half of one per cent. upon the annual net income of the plaintiff in error."

The section of the consolidation act of 1863 that confers the limited rate of taxation is, "that the several immunities, franchises and privileges granted to the said Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, by their original charters, and the amendments thereof, and the liabilities therein imposed, shall continue of force."

But the section of the Code so often referred to contains only one instance in which the right to withdraw the exemption does not exist, and that is where this right is expressly negatived in the charter.

This denial cannot be maintained by inference, by implication, but must be stated in express terms. The most that can be claimed for the provision just quoted is that the several immunities, franchises and privileges shall continue of force during the existence of the charter.

In Tomlinson vs. Jessup, 15 Wall., 454, there came under review the 41st section of an act of the General Assembly of South Carolina, as follows:

"It shall become part of the charter of every corporation which shall at the present or any succeeding session of the General Assembly receive a grant of a charter, or any renewal, amendment

or modification thereof (unless the act granting such charter, renewal, amendment, or modification, shall in express terms except it), that every charter or incorporation granted, renewed or modified as aforesaid, shall at all times remain subject to amendment, alteration or repeal by the legislative authority."

The act incorporating the Northeastern Railroad Company, passed subsequently to the adoption of the above provision, did not except the company from the operations of this section. An amendment to the charter was enacted, as follows:

"That the stock of the said company and the real estate that it now owns * * * * * shall be, and the same is hereby exempted from all taxation during the continuance of the present charter of said company."

The Legislature in 1868 having passed an act taxing the company, the question was, whether the 41st section of that Act of 1841 gave the Legislature authority to withdraw the exemption from taxation. The court held that it did, declaring: "The provisions of that law (Section 41, Act of 1841) therefore constituted the condition upon which every charter of incorporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendments as if incorporated into them. And although the Act of December, 1855, provided that the stock of the company and its real estate should be exempted from taxation during the continuance of the charter, yet this provision did not avail it because, as the court say: "This Act contained no clause, excepting the amendment from provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law." In Pennsylvania College, cases 13 Wall, 214, the following was said by the court in reference to one of the charters:

"Provision is there made that the Constitution of the college shall not be altered or alterable by any law or ordinance of the trustees, nor in any other manner than by an act of the Legislature of the Commonwealth," which is, in all respects, equivalent to an express reservation to the State to make any alterations in the charter, which the Legislature, in its wisdom, may deem fit, just and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees"

The several immunities, franchises and privileges granted to the original companies by their charters were to continue in force, but how long? Until such time as the Legislature might choose to withdraw them. These immunities were by the express terms of that section continued in force only so far as they were consistent with the act of consolidation. There is nothing in that Act to indicate that its purpose was to repeal the provisions of the general law, allowing the Legislature to withdraw these priviliges.

In the Home of the Friendless *vs.* Rouse, 8 Wall, 430, there was an express provision in the charter that the provision of the general law of Missouri, that acts of incorporation should be subject to alteration, suspension or repeal, should not apply to the Home of the Friendless. A like provision existed in the charter of the Washington University, 8 Wall, 439.

In the case of Tomlinson vs. Branch, 15 Wall, 460, the decision was put upon the ground that the consolidation act of 1843, by the third section in express terms withdrew the charter then granted from the operation of the general act of 1841, which latter act empowered the Legislature to alter, amend or repeal the charter.

In the case first cited supra. the court, page 438 say: "As the charter in the controversy was granted in 1853, it would have been subject to this general law, if the Legislature had not in express terms withdrawn from it this discretionary authority."

The case of New Jersey vs. Yard, 95 U. S. R., 104, may be considered a somewhat stronger authority for the plaintiff in error on this point.

(1.) The provision in the law of that State was, that "the charter of every corporation which shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal in the discretion of the Legislature." This language is not so strong as that in the provisions of the South Carolina and Georgia laws, for in them, both the right to withdraw or repeal, was to be held to exist unless there was an express negative to the contrary.

(2.) The Morris and Essex Railroad company was incorporated in 1835; the 15th section of the charter provided that the tax imposed should be only one half of one per centum upon the cost of the road, after the net proceeds amounted to seven per centum on its cost. The 20th section gave the Legislature authority to alter, amend or repeal the act. A supplement to the charter passed in 1836, gave power to build a branch road and repealed the 20th section of the original charter; but reserved the right of the Legislature to alter or amend the supplement, or the act to which this is a supplement, whenever the public good may require it. In 1846 the general act above cited was adopted as to the repeal of charter granted after the passage of that act.

Another branch road was authorized to be built by a supplement passed in 1865, and it was also provided further that the road should pay the tax provided by the original charter, not when the net proceeds should amount to seven per centum on its cost, but in one year after being open and in use to Phillipsburgh and annually thereafter. There was thus a new contract made with the company in regard

to taxation and the act provided that the formal assent of the company should be given in acceptance of it, and that when so accepted this rate so prescribed should be in lieu of all other taxation.

(1.) The Court held that the right given to the Legislature by the supplement passed in 1836, to alter or amend that supplement or the act to which it is a supplement, did not confer the right to alter or amend a supplement passed in 1865.

(2.) That the act of 1846, was confined in its terms to charters granted after its passage and did not apply to the supplement of 1865.

(3.) That the implication that the provision relating to amendment or repeal, did not exist in this case. "(1) Because there was a subject of dispute, and a fair adjustment for a valuable consideration on both sides. (2) The contract assumed by legislative requirement, the shape of a formal written contract. (3) The terms of the contract 'this tax shall be in lieu and satisfastion of all other taxation or imposition whatsoever, by or under the authority of this State or any law thereof,' excludes in view of the whole transaction, the right of the State to revoke it at pleasure."

It must be evident that none of these cases are authority for the position claimed that the act of 1863 was intended to repeal those sections of the Code, making all charters granted after January 1, 1863, subject to be changed, modified and destroyed at the pleasure of the Legislature.

The consolidated company acquired, it is true, all the several immunities, franchises and privileges granted to the original companies by their charters, and the amendments thereto, but how and when did it acquire them? The answer must be at the time of the passage of the act authorizing the consolidation April 18 1863.

In Shields vs. Ohio, 95 U. S. R., 323, the Court say: "It did not acquire any thing by mere transmission. It took every thing by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by refering to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

"If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily

evaded. Laws may be passed at any time, enacting that all the valuable franchises of designated corporations antidating the. Constitution shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created instiutions of the like kind * * When the conssolidation was completed the old corporations were destroyed, a new one was created, and its powers were "granted" to it in all respects, in view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction."

How are grants to corporations to be construed.

It is said that the rule that in cases involving the question whether the State has surrendered the right of taxation, that all presumptions are to be in favor of the State, does not apply to the question whether the State by the act of 1863 has resumed the right.

It seems to be admitted that the general rule is as stated in Pennsylvania Railroad Company, vs. Canal Commissioners, 21 Penn.' "Corporate power can never be *created by implication nor extended by construction.* No privilege is granted, unless it be expressed in *plain and unequivocal words*, testifying the intention of the Legislature in a manner *too plain to be mistaken.* * * * *In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation.*"

Farrington vs. Tennessee, 95 U. S., 686. North Missouri Railroad vs. MaGuire, 20 Wall, 61. Mills vs. St. Clair Co., 16 How., 534. Minturn vs. Larue, 23 How., 437. Perrine vs. Chesapeake and Delaware Canal Co., 9 How., 192. Justices of the Inferior Court, etc. vs. The Griffin & West Point Railroad Co., 9 Ga. R., 475. The Mayor, etc. vs. The Macon & Western Railroad Co., 7 Ga. R., 221. McLeod et. al. vs. Burroughs, 9 Ga. R., 221. Mayor, etc. vs. Central Railroad and Banking Co., 50 Ga., 620. West End & Atlanta Street Railroad Co. vs. Atlanta Street Railroad, 49 Ga. R., 151.

The rule of construing the grant, is the same, whether the exemption claimed is total or only partial and limited.

Buroughs on Tax, page 137.

Tucker vs. Ferguson, 22 Wall, 575. Cooley's Con.

Lim., 52. The Delaware Railroad Tax Cases, 18 Wall, 225. Erie Railroad Co. vs. Pennsylvania, 18 Wall, 498. Jefferson Branch Bank vs. Skelly, 1 Black, 436. Raleigh & Gaston Railroad Co. vs. Reid, 13 Wall, 269. State vs. Maine Central, 66 Me., 496.

The Code of Georgia declares that the State reserves the right of withdrawing the franchise, unless such right is *expressly* negatived in the charter.

All presumptions, therefore, are to be taken in favor of the State and against the corporation.

But if the Act of 1863 is to receive the enlarged construction claimed by counsel for plaintiff in error in conferring this limited rate of taxation upon the consolidated company, then it is respectfully insisted that such an agreement under the facts of these cases would be a *nudum pactum*, and would not constitute a contract.

It will be remembered "That the said two Railroad Companies, under their respective acts of incorporation, had constructed their several lines prior to 1860."

(Printed record, page 8.)

The contract with the State was that they should not be taxed beyond one-half of one per centum upon the net proceeds of their investment, but this contract was with each road separately and not with a new road formed by the union and consolidation of those two companies. Before either line of road had been built, there was a consideration to support the contract; but after both roads had been completed, and there was nothing for the consolidated company to do, no benefit accruing to the State, it lacks the element of consideration to sustain it.

In Tucker vs. Ferguson—22 Wall 527, it was decided that "an act of the Legislature, exempting property of a Railroad from taxation, is not a 'contract' to exempt it unless there be a consideration for the act;" and that an agreement, when there is no consideration, is a nude fact; the promise of a gratuity spontaneously made, which may be kept or recalled at pleasure, and that this rule of law applies to the agreement of States as well as to those of individuals."

In Christ Church vs. Pennsylvania 24, How 300—an act was passed, providing that the real property, including ground, rents now belonging to Christ Church Hospital, in the city of Philadelphia, so long as the same shall belong to said Hospital, shall be and remain free from taxes.

"This concession of the Legislature," remarks Mr. Justice Campbell, "was spontaneous, and no services or

duty or other remunerative condition was imposed upon the corporation. * * * * * It is in the nature of such a privilege, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign."

In Humphrey vs. Pegues 16, Wall 244—the facts were these: The Cheraw and Darlington Railroad Company was incorporated in December, 1849, but had no exemption from taxation. Nothing was done towards building the road until 1863, when an act was passed, amending its charter and exempting it from taxation. Importance seems to have been attached to the fact that the road was unbuilt when this amendment was passed. On page 249 the court say:

"The road was soon afterwards built, and has since been and is now, in operation. These facts serve to show—first, that there was in this instance the consideration that at any time exists for the granting by the Legislature of such privilege to aid the acceptance of the same and the building of the road."

But if the consideration to support these contracts of exemption from taxation be such as stated in that case, certainly when the roads are already completed, an agreement to tax at a limited rate must be without consideration.

The case of State vs. Maine Central 66, Me. 488, is similar in this respect to those now before the court. On page 501, the court say:

"It is claimed that the new corporation, by virtue of the act creating it, is exempt from general taxation. Its exemption must arise from that act if there be such exemption; for it could arise in no other way." * * *

"No consideration is shown for such exemption. The roads which were consolidated had been built for a long time. It is not perceived that the public could gain by the consolidation. The act was one conferring a benefit on the stockholders of the old corporations by giving them a charter to form a new one. All they did was to organize under it."

* * * * * "If a consideration to the State is necessary to the validity of its surrender in whole or in part of its sovereign right of taxation, it is difficult to perceive what is the consideration rendered on the part of the defendant corporation."

This case was reviewed by the Supreme Court of the United States, 96 U. S. 499; but this question was not decided or discussed. In the Home of the Friendless vs. Rouse, 8 Wall., 430, the exemption was made a part of the

original charter; and the reasoning of the Court leads us to suppose that the consideration of the contract consisted in the inducement that would be given by that provision to cause the benevolent to aid in establishing the charity. The public would be benefitted thereby, and the exemption from taxation would materially assist in conferring that benefit.

In Salt Company vs. East Saginaw, 13 Wall., 378, the Court say: "Charters granted to private corporations are held to be private contracts. Powers and privileges are conferred by the State, and corresponding duties and obligations are assumed by the corporation."

It is not perceived what duties and obligations are assumed by the consolidated company in this case to make a sufficient consideration to support a contract between it and the State.

3. Again, it is insisted that plaintiff in error has no valid claim to exemption from taxation, because the company, by accepting the consolidating act of 1863, has placed it beyond its power to comply with the terms upon which the exemption was granted. The plaintiff in error claims that it made and received no net income for the years for which *fi. fas.* have been issued for taxes, and hence does not owe the State anything on this account. But there is no proof that neither of the separate corporations has made or received any net income; one of them may have been in the receipt of a net income while the two consolidated together may not. If plaintiff in error insists upon the State's complying with her contract, it must also be held to a like rigid compliance. There is nothing in the act of 1863 requiring the consolidated company to make a return of its net income, or to pay a tax on the same. That duty must, therefore, devolve upon the separate companies. But neither of them can do this, because both of them have gone out of existence. They have, therefore, voluntarily placed it out of their power to comply with the conditions upon which they were entitled to a limited exemption from taxation. The case of Railroad Company vs. Maine, cited supra, is so analogous to the present that it deserves to be quoted somewhat at length:

"So long as these companies were distinct corporations, only the tax thus prescribed could be imposed upon them. But when they were merged in the new corporation, their distinct corporate existence ceased, except so far as their existence might be necessary for the protection of their creditors, or mortgagees, or those of the new corporation. The conditions upon which the limitation was prescribed

could be performed only while the companies were distinct corporations operating separate lines. Those companies only were required to keep an account of their disbursements, expenditures and receipts for the inspection of the Governor and Council, and committees of the Legislature. Their Directors only were called upon to make a special report to the Legislature whenever their annual income amounted to ten per cent. upon the cost and expenses of their road.

* * * "The assets of all the companies were intermingled; and continuous trains were run over the whole length of the several roads. It would have been impossible to show what would have been the profits of each road without the consolidation. Only an approximation to them would have been attainable; and that would have been based upon estimates more or less speculative in their character.

"The consolidation of the original companies was a voluntary proceeding on their part. The law made it dependent upon their agreement; and that law was presumably passed upon their request, as they are named in it and acted under it. Having thus disabled themselves from a compliance with the conditions, upon the performance of which the amount to be paid as a tax to the State could be ascertained, they must be considered as having waived the exemption dependent upon such performance."

The seventh section of the Act incorporating the Atlantic and Gulf Railroad, passed in 1856, required its President to make a semi-annual report to the Governor containing a full and accurate statement of its pecuniary affairs, as was required of the Maine Companies. But inasmuch as these two companies were taxable under their charters on the net income of each road, and as they were afterwards consolidated without any provision that the State should tax the income of the consolidated companies, it is impossible for this latter company to make the returns required by law, and hence, the exemption must be considered as having been waived.

In reply to the point made by counsel for plaintiff in error that those sections of Code cited in reference to corporations are not properly laws of the State of Georgia, and that the Code itself was not read three times in each House of the General Assembly as required by the Constitution of this State, it is only necessary to quote here what was said by the court in Pennsylvania College cases 13 Wall 212:

"Whether the Act of Assembly in question in this case is or is not repugnant to the Constitution of the State,

is conclusively settled against the complainants by the decision in this very case, and the question is not open to re-examination in this court, as it is not one of Federal cognizance in a case brought here by a writ of error to a State Court."

Respectfully submitted,

ROBERT N. ELY,
Attorney General of Georgia.

Supreme Court of the U. S.

THE ATLANTIC AND GULF RAILROAD CO., *Plaintiff in Error,* *vs.* THE STATE OF GEORGIA. } *No. 103.*

THE SAME *vs.* THE SAME. } *No. 772.*

R. TOOMBS,
of Counsel for Deft in Error

R. O. POLKINHORN, Printer, 832 D Street, Washington, D. C.

Supreme Court of the U. S.

THE ATLANTIC AND GULF RAILROAD CO., *Plaintiff in Error,* *vs.* THE STATE OF GEORGIA. } *No. 103.*

THE SAME *vs.* THE SAME. } *No. 772.*

Both in error to the Supreme Court of the State of Georgia. See facts in Att'y Gen'l. R. N. Ely's brief, and brief of Plaintiff in Error.

These cases arise out of an act, passed the 28th February, 1874, by the legislature of Georgia, imposing State taxes on plaintiff in error, by virtue of which *fi fas* were issued against it, and were proceeding to collect said taxes.

The plaintiff avers that said act violates that clause of Art. I, Section 10, of the Constitution of the Uni-

ted States, which declares that "no State shall pass any law impairing the obligation of contracts;" and in support of said averment alleges, that by its charter, granted by the legislature of Georgia on the 18th of April, 1863, said corporation was, and is, exempt from the imposition by the State of any "higher" tax than one half of one per cent. upon its net annual income, and that imposed by the State exceeds that limitation, and is therefore, to that extent, null and void.

The defendant takes issue on the averment that plaintiff in error had any exemption, either total or partial, from taxation, after the passage of the tax act of 1874, or at the time when, said *fi fas* issued and were levied. That said law of Georgia is a valid law. This is the issue.

The tax act of 1874, repeals so much of plaintiff's charter as may conflict with it. We claim that such repeal was valid, under Sections 1651, 1682, 1683, of the Code of Georgia. See Atty. Gen.'s brief, p. 7. This code went into operation on the first day of January, 1863. Plaintiff's charter was granted on the 18th day of April, 1863, under an act, entitled "an Act to authorize the consolidation of the stocks of the Savannah, Albany and Gulf Railroad Company, and the Atlantic R. R. Company. and for other purposes."

It is no longer an open question, either in this Court, or in the Supreme Court of Georgia, whether or not, private charters granted by the state of Georgia, after the adoption of her code, are subject to the right of the State to the withdrawal of the franchises, or to alter, or amend them at the pleasure of

the State, "unless such right is expressly negatived in the charter." *Central R. R.* vs. *State of Georgia*, 92 U. S. Repts., 670;—this Court says: "Chartered rights granted subsequent to the code may therefore be withdrawn. It is equally certain that those granted before January, the 1st, 1863, cannot be impaired by any subsequent act." See also *West End R. R. Co.* vs. *Atlanta R. R. Co.*, 49 Ga. Repts., p. 158; *Central R. R.* vs. *State*, 54 Ga., 401 to 423; *Ga. R. R.* vs. *Same*, 54 Ga., 423, and the decisions in the two cases now before the court in the record. The Supreme Court of Georgia say, in one of the cases at bar, that "it is not doubtful that the act of 18th April, 1863, granted to plaintiff in error a new charter and abolished the old charters." They put their decision on that point—the question of legislative intention—the intention of the legislature of Georgia, is distinctly and unanimously decided by them in favor of the defendant in error.

Such interpretations of the true intent and meaning of the legislature, as to the local laws, are often conclusive and always justly have great weight with this court. The act of 18th April, 1863, creates a corporation, full and complete under all the definitions of that legal term. It does more;—it abrogates—annuls the last vestige of the rights, franchises, powers, duties of the other corporations, except those which it re-grants by direct words or express reference. It makes a new contract; it introduces new parties to that contract; imposes new and different obligations, new rights, new duties, new considerations upon the ne parties, which had no existence before. If these t

do [not] make a novation, I am unable to define law. The term, either under the civil law, the common, or under all the statute laws upon this subject which have come under my observation, has had this meaning, at least, as far as corporations are concerned.

But if these things do not make a novation of the original contract "between the parties any where else, they do under the laws of Georgia." Code of Georgia says, section 2724, "One simple contract as to the same matter, and on no new consideration, does not destroy another between the same parties; but if new parties are introduced by novation, so as to change the person to whom the obligation is due, the original contract is at an end. Here are new considerations—new parties, to whom the obligation is due. "The obligation of the State, the contract between the State and the Savannah, Albany & Gulf Railroad Co. to relieve the latter from taxation—the performance of which obligation is now claimed by plaintiffs in error, to be due the Atlantic & & Gulf Railroad, no matter under which charter, is therefore at an end. The same is equally true, as between the old and new Atlantic & Gulf charter; and this statute of the State is in complete harmony both with the civil and common law. The State must look to the new corporation alone, for the performance of its duties to the public, and as to all similar duties imposed on the two extinct corporations; they are no longer legal entities, they are therefore dead. The new corporations alone, can claim and exercise whatever privileges, rights, exemptions, and immunities were granted to them under their old

charters, and hold them subject to the laws existing when re-granted.

Central R. R. Co. vs. *Georgia*, 92 U. S. Reports, p. 665.

Sec. 2724, of the code of Georgia, being of force on the 18th April, 1863, when this new charter of the Atlantic & Gulf R. R. Co. was made, became a part of that charter, and was, and is, the law of its construction as much as though it had been inserted in the body of the charter; and the plaintiff in error, in the pleadings in this case, claims its exemptions and immunities under this charter. Grant it; but we reply they are repealed by the law of 1874. See the affidavits of the plaintiff in error, in Attorney-General's brief, pages 12 and 15.

Thus far, then, on this important point, both sides agree upon the definition of the word novation; that is "to transfer an existing claim into a new obligation."

Atlantic Street R. R. 49 *Ga.*, 1851, Brice Green, *ultra vires*, pages 504–5. *et seq.*

This claim of exemption from taxation, has been transferred into a new obligation by the new contract, between the State and all the parties, entered into by the consent of all, on the 18th April, 1863, which exists at the pleasure of the State of Georgia. The public have rights to be respected as well as corporations; the right to tax by lawful government is a right to live, inalienable, indestructible. "It still lives." It will not accept "*trop tard, trop tard, trop tard,*" as its funeral dirge.

2d. The defendant in error further says, that the

exemption claimed in each and all of the charters set up by plaintiff in error, is not expressed in language so plain and unambiguous as to leave no doubt of the intention of the legislature to surrender this sovereign power of the commonwealth. The language "invested with all the rights, privileges, and immunities which, by the laws of Georgia, are held and enjoyed by any other incorporated railroad company within this State," is not sufficient to carry the immunity from taxation, claimed by said plaintiff in error under the charter of 1847, to the Albany, Savannah & Gulf Railroad; nor is the grant of 1856, to the Atlantic & Gulf Railroad by her original charter of "all the privileges, immunities, and exemptions granted the Central Railroad and Banking Company of Georgia, and the Georgia Railroad and Banking Company, or either of them, sufficient to support the claim of a limitation of the power of taxation as claimed by the plaintiff in error.

R. TOOMBS,
of Counsel for Deft in Error